167-578

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 278.

DANIEL A. CAMFIELD AND WILLIAM DRURY,
APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED MAY 23, 1895.

(15,912.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 13, 1896.

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0 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the December term, A. D. 1894, thereof, begun and held at the city of St. Louis, Missouri, in the eighth circuit, on the first Monday in December, it being the third day of December, A. D. 1894, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the eleventh day of August, A. D. 1894, a transcript of record in pursuance to an appeal allowed by the circuit court of the United States for the district of Colorado was filed in the clerk's office of the United States circuit court of appeals for the eighth circuit in a certain cause wherein Daniel A. Camfield and William Drury were appellants and The United States of America appellees; which said transcript of record is in the following words, to wit:

1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on to wit, the 16th day of June A. D. 1893, came The United States of America by Richard Olney, Attorney General, and H. V. Johnson, district attorney its solicitors and filed in said court its bill of complaint, and sued out of and under the seal of said court a subpœna in chancery against Daniel A. Camfield and William Drury.

And the said bill is in words and figures as follows, to wit:

Bill.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss*:

In the Circuit Court of the United States in and for the District of Colorado.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
DANIEL A. CAMFIELD and WILLIAM DRURY, Defendants.

To the honorable judges of the circuit court of the United States aforesaid:

The United States of America, by Richard Olney its Attorney General, and Henry V. Johnson, its attorney for the district of Colorado, brings this its bill of complaint against Daniel A. Camfield, a citizen and resident of the district of Colorado, and William Drury, a citizen and resident of the — district of Illinois.

And thereupon your orator complains and shows unto your

honors that at the present time it is, and for a long time prior hereto, it has been the owner in fee and possessed of a large tract of land, hereinafter referred to and described, the same lying and being within the State of Colorado, and embracing about twenty thousand acres, the same being a portion of the public domain of your orator.

And your orator further showeth unto your honors that it hath been for many years its policy, in furtherance of your orator's design, to develop and utilize the vast and undeveloped resources of your orator's public domain, and to make the same contrib-
2 utory to the comfort and prosperity of your orator's citizens, to permit and encourage the pasturing of sheep, cattle, horses and other domestic animals upon the unappropriated public lands belonging to your orator, subject always, however, to the rights of your orator's citizens and those who have declared their intention to become citizens, (why) by actual settlement and compliance with the acts of Congress and the rules and regulations of your orator's Interior Department, made according to law, seek to take up and secure title to any portion of your orator's public land. That in consequence of said policy of your orator, an enormous industry has been fostered and built up, affording profitable investment to vast sums of capital of your orator's citizens, giving employment to great numbers of men, contributing to the increase of national wealth, supplying cheaper food to your orator's citizens, and largely increasing the production of raw materials for manufacture into clothing and other necessities for the comfort and welfare of your orator's citizens. That your orator doth not now grant and has never granted the right of pasturage and use of its public domain, as aforesaid, in severalty to any person or persons, but the same is purely a permissive right to be used in common by all persons who choose to exercise the same, subject to your orator's right of revocation at any and all times, and to the rights of your orator's citizens and those who have declared their intention to become such, to enter upon and appropriate said lands under the acts of Congress and the rules and regulations aforesaid.

And your orator further showeth that under the said acts of Congress and the rules and regulations aforesaid, it has been its custom to sell its said public domain, and it still holds the same for sale, thereby largely intending to increase your orator's revenues, and contributing also to the permanent settlement and improvement of your orator's domain, and affording cheap homes to your orator's citizens and those who have declared their intention to become such.

And your orator further shows unto your honors that the tracts of land hereinafter described were long prior to the commission of the wrongful acts hereinafter set out, used by your orator's consent for the purposes above recited and to the ends aforesaid, and there were pastured upon said lands a large number of sheep, cattle, horses and other domestic animals, said pasturage being in common and as a common right.

And further showeth your orator that the said Daniel A. Cam-

field and William Drury, defendants herein, well knowing the premises aforesaid; and wrongfully designing and attempting to
3 encroach and intrude upon the lands of your orator in an illegal manner, and to monopolize the use of the same for their own especial and several use, did, prior to the commencement of this suit, and on or about the first day of January, 1893, build, construct, erect and maintain a fence which enclosed and included about twenty thousand acres of your orator's public domain, and declare their intention to maintain the same; that the effect of such fence is to exclude from your orator's public domain all other persons who, as citizens of your orator, have a right to go upon and use the same.

And your orator further shows unto your honors that the lands enclosed by the said Daniel A. Camfield and William Drury aforesaid, are those certain tracts of land lying and being in the county of Weld and State of Colorado, known and described as follows, to wit:

Sections two, four, six, eight, ten, twelve, fourteen, eighteen, twenty, twenty-two, twenty-four, twenty-six, twenty-eight, thirty, thirty-two and thirty-four, in township 8 north of range 63 west of the sixth principal meridian; and also sections two, four, six, eight, ten, twelve, fourteen, eighteen, twenty, twenty-two, twenty-four, twenty-six, thirty, thirty-two and thirty-four, in township 7 north of range 63 west of the sixth principal meridian.

And your orator further showeth unto your honors that the lands inclosed by the fence of the said Daniel A. Camfield and William Drury are extremely valuable to your orator, and to your orator's citizens for the purpose of sale, agriculture and pasture, and that the action of the said defendants in excluding other citizens of your orator from pasturing their sheep, cattle, horses and other domestic animals upon said lands, in common, tends and will tend greatly to hinder, delay and prevent the selling and location of said land under the homestead, and other laws by actual settlers and occupants, and doth also greatly hinder, delay and prevent the sale by your orator of the lands so inclosed.

And your orator further shows unto your honors that the entire section of country in which the lands inclosed, as aforesaid, are located, is, and for a long time heretofore has been used in common by many persons engaged in the business of cattle-raising, and that all of that section has been for a long time stocked to its full capacity, and that this being the case the exclusion from the tract of land inclosed by the said defendants of the sheep, cattle and horses heretofore grazed upon the same, will result in causing other lands in that vicinity to be overstocked, and cause great loss and damage to the owners of the stock who have for a long time been accustomed to use all of said lands in common by virtue of
4 your orator's permission hereinbefore set out, and that in consequence of said injury there will result a general public injury which will extend throughout a large section of country, causing the breed of cattle to deteriorate, the price of provision and other raw material to be increased, and your orator charges

that the action of the said Daniel A. Camfield and William Drury is not only a great and irremediable public injury, but is a common and public nuisance against all of your orator's citizens residing in that section of the country, and results in a purpresture and an unlawful appropriation of your orator's public domain to the exclusive use of the said defendants.

And your orator further shows that a large number of your orator's citizens engaged in business in that section of the country have made complaint of said fence, and have shown to your orator the great and continued injury which has resulted to them from the same.

And further showeth your orator unto your honors that the fence inclosing the lands aforesaid and maintained by the said Daniel A. Camfield and William Drury, is described as follows, to wit:

Beginning at the southeast corner of section 31, township 7, north of range 63 west of the sixth principal meridian, thence west to the southwest corner of said section, thence north to the northwest corner of section 6, township 8, north of range 63 west of the sixth principal meridian, thence east to the northeast corner of section 1, township 8, north of range 63 west of *of* the sixth principal meridian, thence south to the southeast corner of section 36, township 7, north of range 63 west of the sixth principal meridian, thence west to the place of beginning.

And your orator furthermore shows unto your honors that all of the land hereinbefore described as inclosed, lies within the State of Colorado, and within the jurisdiction of this court, and that the fence which incloses said land lies within the State of Colorado, and within the jurisdiction of this court, and that the same is a complete inclosure, and incloses a large tract of your orator's domain in the State of Colorado; all of which said matters and things, including the sections of your orator's land inclosed, the course of said fence, and the position of the same as it extends around said land, will appear more fully from the map filed herewith marked "Exhibit A" and prayed to be taken as a part of this bill.

And further complaining showeth your orator unto your honors, that the lands hereinbefore described lie within the limits of
5 the grant made to the Union Pacific Railroad Company by the act of July 1st, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military and other purposes," and the acts amendatory to said act passed at subsequent dates. Said lands are the even sections lying adjacent to the odd sections granted to said road; and your orator is informed and believes, and so charges the fact to be, that the defendants Daniel A. Camfield and William Drury claim to have procured from the said railroad company a right to the use of the sections granted to said railroad company which lie adjacent to the sections hereinbefore described, either by purchase or lease, and so claiming the right to use the said odd sections owned by the said railroad company, they have built their fence

entirely upon said odd sections, the same being removed a few inches inside the line dividing the railroad company's sections and those belonging to your orator, and that they have run said fence up to the corners of the railroad company's sections and stopped a few inches from where the odd sections join, and then they have left a space of six or eight inches and commenced their fence again upon the odd sections, and continued the same in such manner, as will appear from Exhibit A, filed with this bill. That the said Daniel A. Camfield and William Drury justify the inclosure, hereinbefore charged, by alleging that their fence is built entirely upon lands not belonging to your orator, and that your orator has no right to interfere with the same. Your orator, however, shows and alleges the fact to be that the action of the said Daniel A. Camfield and William Drury is but an attempt to evade the law, and results in the enclosure of a large portion of your orator's domain, as hereinbefore set out, and it is therefore advised that said fence is as unlawful as though it were built entirely upon your orator's public domain.

In tender consideration whereof, and forasmuch as your orator is without full and adequate remedy in the premises, save in a court of equity, and to the end that the said Daniel A. Camfield and William Drury make full, true and direct answer to all and singular the matters and things hereinbefore set out, as full as if they had been particularly interrogated unto, but not under oath, an answer under oath being hereby expressly waived, and to the further end that your orator and its many citizens may have a redress and remedy for the serious wrong and injury threatened to them, as hereinbefore set out, and that the said Daniel A. Camfield and William Drury and their agents and representatives may be ordered, adjudged and decreed to completely and absolutely remove and abate the fence hereinbefore described, from your orator's
6 domain, and from any and every part and portion thereof, and to remove all kinds of inclosure which they may have upon said lands; and that upon a final hearing of this case, an order of injunction be entered, restraining and forbidding the defendants herein, their officers, employees and assigns, and any and all persons claiming by, under or through them, from in any manner keeping up, maintaining and upholding or using said fence, or any part or portion thereof, or from any further attempting to appropriate to their own exclusive use and benefit a portion of your orator's public domain hereinbefore set out and described; that upon the failure of said defendants to abate and remove said fence and every part and portion thereof from your orator's public domain within a time to be fixed by a decree of this court, that the marshal of the United States for the district of Colorado be directed to abate and remove the same at the cost of the said defendants, and for such other (further), and general relief as the nature of the case requires, and to your honors and a court of equity shall seem meet and proper.

May it please your honors to grant that a writ of subpœna issue, according to law, directed to the United States marshal for the dis-

trict of Colorado, and commanding that he summon said Daniel A. Camfield and William Drury to be and appear in this court upon a day to be named in the said subpœna, then and there to answer all and singular the premises aforesaid, and to abide by such orders and decrees as may be entered by this honorable court.

And as in duty bound your orator will ever pray, etc.

RICHARD OLNEY,
Attorney General,
Per H. V. JOHNSON,
U. S. Att'y for Colorado.

H. V. JOHNSON,
U. S. Attorney for Colorado.

(Here follows diagram marked p. 7.)

8&9 Indorsed: No. 2972. The United States of America, plaintiff, *vs.* Daniel A. Camfield and William Drury, defendant. Bill of complaint. Filed June 16, 1893. Robert Bailey, clerk. Richard Olney, Attorney General, for complainant.

And the said subpœna and marshal's return is in words and figures as follows, to wit:

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

The President of the United States of America to Daniel A. Camfield and William Drury, Greeting:

You and every of you are hereby commanded that you appear before the judges of the circuit court of the United States of America, for the district of Colorado, at the city of Denver, in said district, on the first Monday in August next (it being the 7th day of August, A. D. 1893), to answer the bill of complaint of the United States of America this day filed in the office of the clerk of said court, in said city of Denver, then and there to receive and abide by such judgment and decree as shall then or thereafter be had upon said bill of complaint, upon pain of judgment being pronounced against you by default, and a decree had and entered accordingly.

To the marshal of the district of Colorado to execute, and make due return.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of the said circuit court, at the city of Denver aforesaid, this 16th day of June in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the 117th year.

[SEAL.] ROBERT BAILEY, *Clerk.*

Memorandum.

The above-named defendants are hereby notified that unless they and each of them shall enter their appearance in the office of the clerk of said court, at the city of Denver aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against them as confessed, and a decree entered accordingly.

ROBERT BAILEY, *Clerk.*

10 *Marshal's Return.*

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

DENVER, *June* 19, 1893.

I have duly executed the within writ, by delivering to James W. McCreary, H. E. Churchill and A. C. Patton, attorneys and solicitors for the within-named defendants and each of them, personally, a true copy of the within writ, at the place and time as follows, to wit: As to —— ——, on the 17th day of June, A. D. 1893, at Greeley in Weld county.

This writ therefore returned executed as the law directs, this 19th day of June, A. D. 1893.

A. H. JONES, *Marshal,*
By J. J. S. WARWICK,
Deputy Marshal.

Marshal's Fees.

Service, 2 persons, at $2.00 each	$4 00
Mileage, 52 miles, at 6c.; going only	3 12
Total	$7 12

STATE OF COLORADO, } ss:
County of Weld, }

We hereby acknowledge service of the within subpœna and enter appearance for the within-named defendants reserving to them all legal rights and all manner of pleas, motions and defenses to which they are in any manner entitled within the time mentioned as the return day of the within writ.

JAS. W. McCREERY,
H. E. CHURCHILL,
A. C. PATTON,
Attorneys & Solicitors for Respondents.

Indorsed: No. 2972. Circuit court of the United States for the district of Colorado. In chancery. The United States of America *vs.* Daniel A. Camfield and William Drury. Subpœna. Returnable to rule day, first Monday in August. A. D. 1893. Robert Bailey, clerk. Filed this 19th day of June, A. D. 1893. Robert Bailey, clerk. Henry V. Johnson of Denver, compl't's sol'r.

11 *Answer.*

UNITED STATES OF AMERICA, }
District of Colorado. }

In the Circuit Court of the United States in and for the District of Colorado.

THE UNITED STATES OF AMERICA, Plaintiff, }
vs. }
DANIEL A. CAMFIELD and WILLIAM DRURY, Defendants. }

The answer of Daniel A. Camfield and William Drury, defendants, to the bill of complaint of The United States of America, complainant.

These defendants, now and at all times hereafter, saving and reserving to themselves, each of them, all benefit and advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereto or to so much thereof as these defendants are advised or are material or necessary for them, or any of them to make answer unto, they, these defendants severally answering, say:

That defendant, William Drury, above named, has heretofore purchased from the Union Pacific Railway Company, and entered into the possession of the following-described lands to wit: All the odd-numbered sections in townships seven (7) and eight (8), north range, sixty-three (63), west of the sixth principal meridian; that all of said lands lie adjacent to Crow creek, a natural stream, which has its rise in the State of Wyoming, and runs thence southerly through the northern part of the State of Colorado and into the South Platte river; that all of said lands, and all the lands in the same vicinity are arid and incapable of successful cultivation without irrigation; that the same Crow creek is the only stream available to supply waters for the irrigation of the said described lands and lands belonging to the United States in the same vicinity; that the said stream in its natural and ordinary flow is a small and inconsiderable stream; that said Crow creek is the natural drainage channel for a large extent of territory, and that during the summer months it carries large volumes of water, resulting from the heavy rains and storms which frequently occur during such months; that in order that such waters be made available for irrigation, it is necessary that the same be impounded in large storage reservoirs, and, at suitable times drawn therefrom for application to said lands.

12 That the said defendants have undertaken to build large reservoirs to be supplied from Crow creek for the irrigation of their said lands and other lands in the same neighborhood; that said defendants have proceeded in accordance with the act of Congress, in acquiring from the United States, the necessary sites, rights of way, and lands to be used in such construction; that they have in accordance with said act, filed maps with the Secretary of the

Interior, reference to which is hereby made, and have also expended large sums of money in the actual construction thereof; that the defendants have in all things complied with the acts of Congress, and the laws of the State of Colorado, in regard to the construction of said reservoirs and the appropriation of water thereby; that it is the purpose and intention of said defendants, by means of said reservoirs, not only to supply water to the said lands, above described, but as well to the even-numbered sections adjacent to the above-described lands and belonging to the Government of the United States and its settlers thereon, as appears from their sworn statements, heretofore filed in accordance with the requirements of the general statutes of Colorado, reference to which is hereby made.

That said defendants, Camfield and Drury, are together interested in and contributing to the construction of said large reservoirs, as aforesaid, covering a total area of about eight hundred acres (800) which when completed will have a sufficient capacity for the storage of water for the irrigation of thirty thousand (30,000) acres of land, never heretofore and not otherwise capable of being brought under irrigation.

That the said enterprise- of defendants are of great advantage, not only to said defendants, but to the public generally, as well as to the plaintiff, The United States of America, and the development and settlement of the public domain, and large bodies of land, now arid, and of but little value, will be redeemed to agriculture and cultivation, and large revenues result therefrom to the United States, and especially its citizens, who have become and shall become settlers thereon under the land laws of the United States.

That in the development of said enterprises for the storage of water and for the irrigation of lands, defendants found it necessary to fence their said lands, and have therefore constructed fences thereon; that all of said fences are entirely upon the land of the defendant, William Drury, above named; that the fences have been constructed substantially as set out in plaintiff's complaint herein, save and except, that the enclosure resulting from said fences of some of plaintiff's land, is not a complete enclosure, as set forth in plaintiff's complaint; that at each section line throughout
13 the whole extent of said fence and fences, a swinging gate has been placed, sixteen feet in length, thereby affording free and easy passage on the part of the public, into, over and upon all of plaintiff's said lands, said gate being at all times without lock or fastening, and easily opened for ingress, egress and regress on the part of all of plaintiff's said citizens, who may desire.

That by reason of the enterprises aforesaid of defendants, lately begun and now being carried forward rapidly to completion, large numbers of plaintiff's citizens have initiated settlements and signified their intention of making settlements upon the said even-numbered sections belonging to the United States, for the purpose of cultivating the same, and making homes thereon; that instead of the said enterprises of defendants and the fences they have constructed on the lands of the said William Drury being a hindrance

to the settlers of plaintiff, the same constitute and have constituted a powerful incentive to such settlement and cultivation.

That the defendant Camfield, is the agent of defendant, Drury, in the construction of fences and improvements on said lands; that the said fences are described as follows:

Commencing at the northeast corner of section one (1), township eight (8) north, range sixty-three (63) west, continuing thence west to the northwest corner of section six (6), in said township and range, thence to the southwest corner of section thirty-one (31), to township seven (7) north, range sixty-three (63) west, thence east to the southeast corner of section thirty-five (35), in said township and range, and not otherwise; that from said last-mentioned point, fences of other persons, enclosing their private lands, extend in a northeasterly direction to the southeast corner of section eight, township seven north, range sixty-two west; thence north to the northeast corner of section five in said township and range. That no fence thence connects with any fence of defendant; that said reservoirs above described are mostly within said partial enclosure, and located upon sections five and six, in township seven north, range sixty-two west; that said reservoirs are an essential part of the improvements of said lands of Drury; that ditches, reservoirs and other water works on and over the public domain are customarily fenced for protection.

Defendants further answering say—that they admit that heretofore the lands described in said complaint as belonging to the United States, together with the lands belonging to the defendant, Drury, above described, have been an open part of the public domain, and have been used to some extent for the pasturage of range stock and the range industry.

14 Defendants say, that prior to and at the inception of their said enterprise, such use of said lands had been largely discontinued; that the progress of settlement in that part of Colorado wherein said lands are situated, has been great during the last five (5) years, and land is being rapidly taken up by actual settlers, particularly along the streams, whereby the value of such lands, for the range industry, were greatly depreciated, and have become so cut up by such settlements, that the large herds, heretofore ranging on said lands, could no longer be accommodated, either as to pasturage or water; that thereby, the said stock industry was by such settlement, being rapidly driven out, so giving place to the more valuable use of the land for agriculture; that defendants' said enterprises are entirely in line with and necessary to the settlement of the country, and its reclamation from aridity to cultivation; that said enterprises of defendants greatly contribute and assist in such reclamation and settlement, and are of great and lasting benefit, not only to the settlers on the public domain, citizens of the plaintiff, but directly contribute to the benefit of plaintiff, The United States, and largely increase its revenues, likewise contributing to the increase of national wealth, and the supply of food, and the productions of raw material for the manufacture of clothing and other necessities for the comfort and welfare of plaintiff's citizens,

greatly in excess of any such benefits to be derived to plaintiff and its citizens from the use of the said lands, in their arid state, for pasturage.

Defendants further answering, say—and deny that they, or either of them have wrongfully designed or attempted to encroach and intrude upon the lands of plaintiff, The United States, in any illegal manner or monopolize the use of the same for their own and special use, or that they have or either of them has in any manner interfered or attempted to interfere with any industry lawfully carried on by the use of said lands or have in any manner interfered with the settlement of plaintiff's domain, or with its revenues derived therefrom, that on the contrary, by their said enterprises, — have greatly stimulated such settlements, and the increase of revenues to said complainant.

Den*ies* that their said enterprise will tend to greatly hinder, delay or prevent the sale and location of said lands, or that said enterprise and fences will in any manner hinder, delay or prevent the sale and location of said lands under the homestead and other laws by actual settlers and occupants, but aver, that on the contrary, their said fences and improvements tend greatly to encourage the settling and the occupancy thereof by actual settlers; den*ies* that by reason of its said fences and other improvements being placed upon said lands, a general public injury will extend throughout a large section of the country, or that any injury to the public domain or otherwise will ensue, or that the breed of cattle will be deteriorated or that any irremediable injury will result by reason of the premises or that the same constitutes a common and public nuisance against plaintiff's citizens residing in that country or result in the purpresture or unlawful appropriation of plaintiff's public domain or that any injury of any kind or nature whatsoever has in any manner been done by said defendants or suffered by plaintiff and its citizens.

And these defendants deny all and all manner of combination and confederacy, wherewith they are by the said bill charged, without this that there is any other matter, cause or thing in the complainant's said bill of complaint contained, material or necessary for these defendants to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed or denied, is true to the knowledge or belief of these defendants, all of which matters and things, these defendants are ready and willing to aver, maintain and prove as this honorable court shall direct, and pray*s* to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

JAS. W. McCREERY,
A. C. PATTON,
H. E. CHURCHILL,
Solicitors for Defendants.

Indorsed: No. 2972. United States of America, District of Colorado. In the circuit court of the United States in and for the district of Colorado. The United States of America, plaintiff, *vs.* Daniel

A. Camfield and William Drury, defendants. (Original.) Answer Filed Aug. 1, 1893. Robert Bailey, clerk U. S. circuit court. James W. McCreery, A. C. Patton and H. E. Churchill, solicitors for defendants, Greeley, Colorado.

Exceptions for Insufficiency to the Answer of Daniel A. Camfield and William Drury, Defendants in the Above Case.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Circuit Court of the United States in and for the District of Colorado.

UNITED STATES OF AMERICA, Plaintiff, }
vs.
DANIEL A. CAMFIELD and WILLIAM DRURY, Defendants. }

Complainant excepts to the answer of said defendants herein filed for insufficiency for that said answer does not consti-
16 tute facts sufficient to constitute a defense to the matters and things alleged in plaintiff's complaint herein, for which reasons said answer is insufficient and incomplete and ought to be amended and plaintiff prays that the same be amended accordingly.

HENRY V. JOHNSON,
U. S. Att'y for Colo.
JAS. E. CARRIGUES,
Att'y for Pl'ff.

Indorsed: No. 2972. Circuit court of U. S. in & for the district of Colorado. U. S. of America, plaintiff, *vs.* Daniel A. Camfield & Wm. Drury, defendants. Exceptions to answer of defendants. Filed Aug. 30, 1893. Robert Bailey, clerk U. S. circuit court. Henry V. Johnson, U. S. att'y for Colo. & Jas. E. Garrigues, attorney for pl't'ff.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States for the District of Colorado.

UNITED STATES OF AMERICA }
vs.
DANIEL A. CAMFIELD *et al.* }

HALLETT, *J.*:

The act of Congress of Feb. 25, 1885 (23 Stat. 321) declares that any enclosure of public lands made without claim or color of title shall be unlawful and confers jurisdiction on Federal courts to abate and remove in a summary way all fences erected contrary to the provisions of the act. In this bill the Government seeks to enforce the act with respect to certain fences erected by respondents enclosing Government lands in townships 7 & 8 north of range 63 west of the 6th principal meridian covering an area of 20,000 acres. It is charged in the bill that respondents owning odd-numbered sections

in these townships and other townships adjacent, have erected a fence on their own lands in such manner as to enclose the even-numbered sections in townships 7 & 8 belonging to the Government.

Respondents confess the fact to be as alleged and say that the enclosure was made with a view to bring the lands under cultivation by building canals and reservoirs from which they may be irrigated. As to respondents' intent we cannot inquire, for that is not under this statute a judicial question. If the fence is forbidden by statute we are not at liberty to inquire with what intent it was built; and obviously the case is within the statute which de-
17 clares "that all enclosures of public lands" shall be unlawful without reference to whether the fence constituting the enclosure shall be on public or private lands. The circumstance that respondents have put their fence on their own lands is of no weight against the fact that the fence makes an enclosure of public lands. Often in this circuit the statute has been declared to have this effect and some of the cases are found in the reports.

United States *vs.* Brighton Ranch Co. *et al.*, 25 Fed. Rep., 465; S. C., 26 Fed. Rep., 218.

United States *vs.* Cleveland & Colo. Cattle Co., 35 Fed. Rep., 323.

Respondents rely on two cases which seem to support the answer but they cannot be accepted in this court.

United States *vs.* Douglas-Willan Sartoris Co., 3 Wyo., 288.

United States *vs.* Brandestein & others, 32 Fed. Rep., 738.

The exceptions to the answer will be sustained.

Indorsed: 2972. U. S. circuit court. United States *vs.* Camfield *et al.* Opinion on exceptions to answer. Hallet, J. Filed Jan. 25, 1894. Robert Bailey, clerk U. S. circuit court.

60th day, Thursday, January 25th, A. D. 1894.

Present: The Honorable Moses Hallett, district judge, and other officers as noted on the 7th day of November, last past.

THE UNITED STATES OF AMERICA
vs.
DANIEL CAMFIELD and WILLIAM DRURY. } 2972. In Chancery.

Bill to remove fence from public land.

The exceptions to the answer of the said respondents having heretofore come on to be heard and having been argued by counsel, H. V. Johnson, Esq., appearing as solicitor for the said complainant and the said respondents appearing by J. W. McCreery, Esq., their solicitor and by the court taken under advisement and the court being now sufficiently advised in the premises, it is ordered, for good and sufficient reasons to the court appearing, that the exceptions be and are hereby sustained.

18 61st day, Friday, January 26th, A. D. 1894.

Present: The Honorable Moses Hallett, district judge, and other officers as noted on the 7th day of November, last past.

THE UNITED STATES OF AMERICA
vs.
DANIEL CAMFIELD and WILLIAM DRURY. } 2972. In Chancery.

Bill to remove fence from public land.

At this day come the said respondents by J. W. McCreery, Esq. their solicitor and on their motion, it is ordered by the court, that they have leave to file an amended answer herein, within thirty (30) days from this date, as they shall be advised.

17th day, Saturday, May 19th, A. D. 1894.

Present: The Honorable Moses Hallett, district judge, and other officers as noted on the first instant.

THE UNITED STATES OF AMERICA
vs.
DANIEL A. CAMFIELD and WILLIAM DRURY. } 2972. In Chancery.

Bill to remove fences from public lands.

This cause coming on for hearing upon the pleadings herein, the exceptions to defendants' answer by complainant that said answer does not state facts sufficient to constitute a defense to the matters and things in plaintiff's bill of complaint herein, having been on the 25th day of January, 1894, sustained by the court, after full argument by counsel for plaintiff and defendants; and defendants after full and due notice that said exceptions to their answer had been sustained having elected to stand by their original answer, and having in open court declined to answer further, and the court being sufficiently advised, it is hereby ordered, adjudged and decreed that said bill of complaint be and the same is hereby taken as confessed.

And is is hereby further ordered, adjudged and decreed that the said defendants do absolutely remove and abate the fences described in the complaint, to wit, that certain fence enclosing the lands mentioned and described in the bill of complaint, which said fence is more particularly described as follows, to wit: Beginning at the southeast corner of section thirty-one (31) township seven (7) north of range sixty-three (63) west of the sixth (6th) principal meridian; thence west to the southeast corner of said section; thence north to
19 the northwest corner of section six (6) township eight (8) north of range sixty-three (63) west of the sixth (6th) principal meridian; thence east to the northeast corner of section one (1) township eight (8) north of range sixty-three (63) west of the sixth principal meridian; thence south to the southeast corner of section thirty-six (36) township seven (7) north of range sixty-

three (63) west of the sixth principal meridian; thence west to the place of beginning.

And that said defendants do so absolutely remove and abate said fences, and every part and parcel thereof within thirty days after the date of this decree; and that they, their assigns, agents, assistants and employés and each and every of them be and hereby are forever and absolutely enjoined and restrained from keeping, maintaining, upholding, or supporting said fences and barriers or any part or parcel thereof or any fences or barriers, upon any part of the public domain, not appropriated by them according to law; and in case said fences are not utterly abated and removed within the time aforesaid, the marshal of the United States within and for the district of Colorado is hereby directed to abate and remove the same at the cost of said defendant-; and that all costs of the complainant in the premises be and hereby are made a lien on the material in said fences contained.

It is further ordered, adjudged and decreed that the said complainant do have and recover of the said defendant- its costs herein to be taxed, and have execution therefor.

The defendants are hereby granted an appeal to the United States circuit court of appeals, upon giving a bond in the sum of one thousand dollars to be approved by the court, and they are allowed thirty days from the date of this decree for the purpose of perfecting said appeal.

THE UNITED STATES OF AMERICA, }
District of Colorado. }

Know all men by these presents, that we, Daniel A. Camfield and William Drury are held and firmly bound unto the United States of America in the full and just sum of one thousand dollars, to be paid to the said United States of America to which payment well and truly made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of May in the year of our Lord one thousand eight hundred and ninety-four.

Whereas, lately at the May term, A. D. 1894, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between The United States of America, plaintiff, and Daniel A. Camfield and William Drury, defendant-, a decree in chancery was rendered against the said Daniel A. Camfield and William Drury and the said Daniel A. Camfield and William Drury having proved and been allowed an appeal from said decree to the United States circuit court of appeals for the eighth circuit and a citation directed to the said plaintiff citing and admonishing it to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation:

Now, the condition of the above obligation is such, that if the *the* said Daniel A. Camfield and William Drury shall prosecute said appeal to effect, and answer all damages and costs, if they fail to

make good their plea, then the above obligation to be void, else to remain in full force and virtue.

DANIEL A. CAMPFIELD. [SEAL.]
WM. DRURY. [SEAL.]

Sealed and delivered in presence of—
H. E. CHURCHILL,
As to Camfield *as to Camfield.*
ED. L. DRURY,
As to Wm. Drury.

Approved:
JOHN A. RINER,
Dist. Judge, Assigned to Hold the Circuit Court.

Justification.

THE UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Daniel A. Camfield and —— ——, sureties on the within bond, being each first duly sworn, deposes and saith that he is worth in real estate & water rights the sum below set opposite his name—that is to say—as to Daniel A. Camfield, $10,000.00 *dollars;* as to Wm. Drury, $20,000 *dollars*—over and above all his just debts and liabilities, and in property subject to levy and sale upon execution.

DANIEL A. CAMFIELD.

Subscribed and sworn to before me, at Greeley, Colo., this 6th day of June, A. D. 1894.

[SEAL.] ELBERT C. SMITH,
Notary Public.

21 STATE OF ILLINOIS, } ss:
Mercer County, }

This will certify that Wm. Drury, one of the sureties on the within and attached bond, first being duly sworn deposes and says, that he is worth in real estate, the sum of twenty thousand dollars, over and above all his just debts and liabilities, and in property subject to levy and sale upon execution.

WM. DRURY.

Subscribed and sworn to before me at New Boston, Illinois, this secon- day of June, 1894.

[SEAL.] THOS. H. DOUGHTY,
Notary Public.

Indorsed: Gen. No. 2972. Circuit court of the United States, district of Colorado. United States *vs.* Daniel A. Camfield & Wm. Drury. Bond on appeal. $1,000.00. Filed this 11th day of June A. D. 1894. Robert Bailey, clerk.

Assignment of Error on Appeal to the Circuit Court of Appeals.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

In the Circuit Court of the United States in and for the District of Colorado.

UNITED STATES OF AMERICA, Plaintiff, }
vs. }
DANIEL A. CAMFIELD and WILLIAM DRURY, Def'ts. }

Come now defendants above named appellants herein by their attorney James W. McCreery and says that there is manifest error in the record herein and that such errors are particularly as follows:

1. The court erred in sustaining plaintiff's objections and exceptions to the answer of defendants herein.

2. The court erred in holding that the answer of defendants herein was and is insufficient to constitute a defense to plaintiff's complaint.

3. The court erred in giving a judgment and decree in favor of plaintiff that defendants' fences be abated.

4. The court erred in refusing to dismiss plaintiff's bill herein for want of law and equity to sustain it.

Wherefore defendants pray that by reason of said errors and other manifest errors in the record that said judgment and decree herein be reversed.

JAMES W. McCREERY,
Solic. & Att'y for Defendants.

22 Indorsed: No. 2972. U. S. circuit court. United States of America *vs.* Daniel A. Camfield *et al.* Assignment of errors. Filed Jun- 11, 1894. Robert Bailey, clerk U. S. circuit court. Jas. W. McCreery, H. E. Churchill, A. C. Patton, solicitors for defendants.

THE UNITED STATES OF AMERICA, }
District of Colorado. }

The United States of America to United States of America, Greeting:

You are hereby cited and admonished to be and appear, in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Colorado, sitting at Denver, in said district, wherein Daniel A. Camfield and William Drury are appellants, plaintiff- in error, and you are appellee in error, to show cause if any there be, why the judgment rendered against the said plaintiff- in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John A. Riner, district judge for the district of Wyoming, assigned to hold the circuit court of the United States for the district of Colorado, this eleventh day of June, in the year of our Lord one thousand eight hundred and ninety-four.

JOHN A. RINER,
District Judge Assigned to Hold the Circuit Court for the District of Colorado.

Proof of Service.

THE UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

JUNE 11TH, 1894.

I accept service of the within citation.

HENRY V. JOHNSON,
U. S. Att'y for Colorado.

Gen. No. 2972. United States circuit court of appeals, eighth circuit. Daniel Camfield and William Drury, plaintiff in error, *vs.* The United States of America, defendant in error. Citation. Filed in United States circuit court for the district of Colorado, this 11th day of June, A. D. 1894. Robert Bailey, clerk. Jas. W. McCreery, attorney for plaintiff in error.

23 UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

I, Robert Bailey, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing to be a true, perfect and complete transcript and copy of the record and proceedings and of all thereof heretofore filed or had and entered of record in said court, and in a certain cause lately in said court pending, wherein The United States of America was complainant and Daniel A. Camfield and William Drury were defendants, as fully and completely as the same still remains on file or of record in my office, at Denver.

Seal of the United States Circuit Court, District of Colorado.

In testimony to the above, I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 25th day of July, A. D. 1894.

ROBERT BAILEY, *Clerk,*
By CHARLES N. BISHOP,
Deputy Clerk.

Filed Aug. 11, 1894. John D. Jordan, clerk.

24 And on the twenty-ninth day of August, A. D. 1894, an appearance of counsel for appellant was filed in said cause in the following words, to wit:

Appearance for Appellants.

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1894.

DANIEL A. CAMFIELD and WILLIAM DRURY, Appellants,
vs.
THE UNITED STATES. } No. 517.

The clerk will enter my appearance as counsel for the appellants.

JAS. W. McCREERY.
A. C. PATTON.
HARRY E. CHURCHILL.
CHAS. W. BATES.

Endorsed: U. S. circuit court of appeals, eighth circuit, December term, 1894. No. 517. Daniel A. Camfield *et al.*, appellants, *vs.* The United States. Appearance. Filed Aug. 29, 1894. John D. Jordan, clerk. Jas. W. McCreery, A. C. Patton, Harry E. Churchill, Chas. W. Bates, counsel for appellants.

And on the fifteenth day of December, A. D. 1894, an appearance of counsel for the appellee was filed in said cause in the following words, to wit:

Appearance for Appellee.

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1894.

DANIEL A. CAMFIELD and WILLIAM DRURY, Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee. } No. 517.

The clerk will enter my appearance as counsel for the appellee.

HENRY V. JOHNSON,
U. S. District Att'y for Colorado, of Counsel.

25 Endorsed: U. S. circuit court of appeals, eighth circuit, December term, 1894. No. 517. Daniel A. Camfield *et al.*, appellants, *vs.* The U. S. of America, appellee. Appearance. Filed December 15, 1894. John D. Jordan, clerk. Henry V. Johnson, U. S. att'y, Denver, counsel for appellee.

And on the twenty-fifth day of January, A. D. 1895, in the record of the proceedings of the December term, 1894, of said court is an order of submission in said cause in the following words:

Order of Submission.

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1894.

DANIEL A. CAMFIELD and WILLIAM DRURY, Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee. } No. 517.

Appeal from the circuit court of the United States for the district of Colorado.

FRIDAY, *January* 25, 1895.

This cause having been called for hearing this day, the same was argued by Mr. James W. McCreery in behalf of appellants and by Mr. Henry V. Johnson for the appellee. Thereupon the cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

And on the twentieth day of February, A. D. 1895, an opinion of said United States circuit court of appeals was filed in said cause in the following words:

Opinion.

26 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1894.

DANIEL A. CAMFIELD and WILLIAM DRURY, Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee. } No. 517.

Appeal from the circuit court of the United States for the district of Colorado.

Mr. James W. McCreery (Mr. A. C. Patton, Mr. H. E. Churchill and Mr. C. W. Bates were with him on the brief) for appellants.

Mr. Henry V. Johnson, United States attorney for the district of Colorado, for appellee.

Before Caldwell, Sanborn, and Thayer, circuit judges.

Statement.

This was a bill filed by the United States against Daniel A. Camfield and William Drury, the appellants, in the circuit court of the United States for the district of Colorado, under the provisions of an act of Congress approved on February 25, 1885, entitled: "An act to prevent unlawful occupancy of the public lands;" 23 Stat. p. 321, ch. 149. The first section of said act is as follows:

"That all inclosures of any public lands in any State or Territory of the United States, heretofore or to be hereafter made, erected or constructed by any person, party, association or corporation, to any of which land included within the inclosure, the person, party, association or corporation making or controlling the inclosure had no

claim or color of title made or acquired in good faith, or an
27 asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any State or any of the Territories of the United States, without claim, color of title or asserted right as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited."

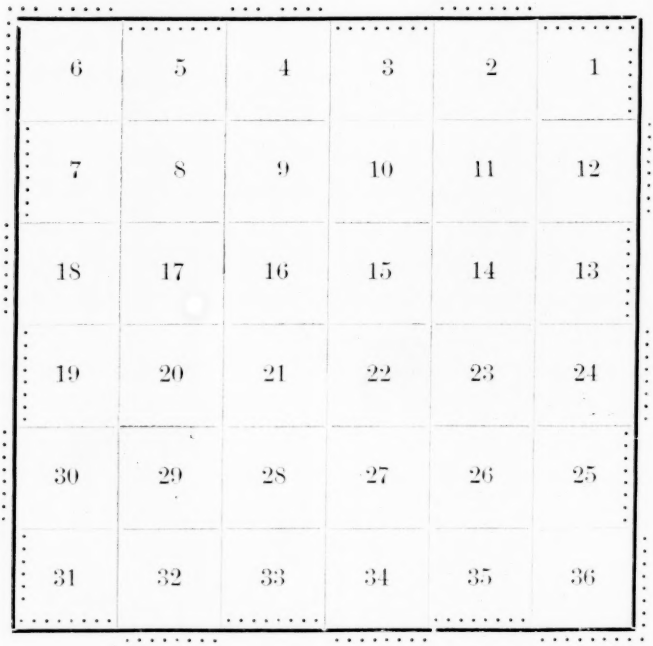
By section 2 of said act, it is made the duty of the district attorney of the United States for the proper district, when complaint is made to him by affidavit by any citizen of the United States, that section one of the act is being violated, to institute a civil suit in the name of the United States in the proper United States district or circuit court, against the person or persons charged with making the unlawful inclosure complained of. By said section jurisdiction is also conferred upon any United States district or circuit court or territorial district court having jurisdiction over the locality where the land enclosed or any part thereof, shall be situated, to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of the act. It is also made the duty of said courts in case any inclosure shall be found to be unlawful, to make the proper order, judgment or decree for the destruction of the inclosure, in a summary way, unless the inclosure shall be removed by the parties complained of within five days after they are ordered to do so.

The bill in the present case charged, in substance, that the defendants, Daniel A. Camfield and William Drury, with intent to encroach and intrude upon the lands of the United States in an illegal manner and to monopolize the use of the same for their own special benefit, did, on or about the 1st of January, 1893, build, construct, erect and maintain a fence which inclosed and included about twenty thousand acres of the public domain of the United States, and that the effect of such inclosure was to exclude the United States and all other persons, except the defendants, therefrom; that the lands thus wrongfully inclosed consisted of all of the even-numbered sections in townships numbers 7 and 8 north of range 63 west of the sixth principal meridian. The bill of complaint further averred that said townships 7 and 8 lie within the limits of the grant made by the Government to the Union Pacific Railroad Company; that the defendants had acquired from said railroad company the right to use all the odd-numbered sections of land which lie within said townships 7 and 8 and outside thereof immediately adjacent to the even-numbered sections lying within and on the margin of said townships, and that in building the fence complained of the defendants had constructed it entirely on odd-numbered sections either within or without townships 7 and 8 so as to completely inclose all of the

Government lands aforesaid, but without locating the fence on any part of the public domain so inclosed.

28 (The subjoined diagram of one township will serve to illustrate the manner in which the fence was constructed so as to inclose the even-numbered sections. The fence is indicated by the dotted lines.)

Diagram.



The defendants admitted by their answer that they had constructed a fence so as to inclose all of the even-numbered sections in townships 7 and 8, substantially as set out above in the plaintiff's complaint, save and except that at each section line a swinging gate had been placed to afford access to so much of the public domain as was inclosed by the aforesaid fence. By their answer the defendants sought to justify the erection of the fence in question, on the ground that they owned all the odd-numbered sections in townships 7 and 8 and that they were engaged in building large reservoirs for the purpose of irrigating the land by them owned and much other land in that vicinity. They averred that in carrying out such irrigation scheme, they found it necessary to fence their lands in townships 7 and 8 in the manner above described. They also denied that they had any intention of monopolizing the

even-numbered sections inclosed by said fence or to exclude the public therefrom; they further averred, in substance, that the work in which they were engaged was of great importance and utility and would redound to the great advantage of the United States and its citizens. The answer was excepted to on the ground
29 that it was insufficient to constitute a defense to the bill. This exception was sustained, and, as the defendants declined to plead further, a decree was entered in favor of the Government, from which decree the defendants have appealed.

THAYER, *J.*, after stating the case as above, delivered the opinion of the court.

Section one of the act of February 25, 1885, *supra*, declared in effect, that it should thereafter be deemed unlawful for any person, association or corporation, to make or maintain an inclosure which embraced within its limits any public land of the United States to which the person making or maintaining the inclosure had no claim or color of title and to which he asserted no right under a claim made in good faith with a view to the entry thereof at the proper land office under the general laws of the United States. The statute in question is general in its terms, and it contains no exceptions. It was within the power of Congress to enact such a law, and, having enacted it, it is not within the province of the judiciary to inquire or to decide whether the measure was politic or impolitic, wise or unwise. The answer filed by the defendants admitted, in substance, that the defendants had caused an inclosure to be made which embraced within its limits more than twenty thousand acres of the public domain. This admission brought them within the inhibitions of the law. It matters not what their intent may have been in making the inclosure; the courts charged with the enforcement of the law cannot say that the construction of a dam, for purposes of irrigation, is a work of such great utility and importance, that in the execution of the same, the plain mandate of the statute may be disregarded. In support of their contention that the answer disclosed a good defense to the bill, we have been referred by counsel for the appellants, to the case of United States *v.* Douglas-Willan Sartoris Co., 3 Wyo. 288; *id.* 22 Pac. Rep. 92; but we cannot concur in the views expressed by the majority of the court in that case. We think that the defendants admitted that they had been guilty of a violation of the act of February 25, 1885, and that the matters pleaded by way of excuse do not amount to a justification of the unlawful act in question.

The decree of the circuit court of the United States for the district of Colorado is therefore—

Affirmed.

Filed February 20, 1895.

30 And on the same day, to wit, February 20, A. D. 1895, a decree was entered in said cause in the following words, to wit:

Decree.

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1894.

DANIEL A. CAMFIELD and WILLIAM DRURY, Appellants,
vs.
THE UNITED STATES OF AMERICA. } No. 517.

Appeal from the circuit court of the United States for the district of Colorado.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Colorado and was argued by counsel—

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed without costs to either party in this court.

February 20, 1895.

Approved.

A. M. THAYER, *Judge.*

Endorsed: U. S. circuit court of appeals, eighth circuit. No. 517. December term, 1894. Daniel A. Camfield *et al.*, appellants, *vs.* The United States of America. Decree. Filed Feb. 20, 1895. John D. Jordan, clerk.

And on the twelfth day of March, A. D. 1895, a petition for a rehearing was filed by counsel for appellants in said cause in the following words, to wit:

Petition for Rehearing.

31 In the United States Circuit Court of Appeals, Eighth Circuit, December Term, 1894.

DANIEL A. CAMFIELD and WILLIAM DRURY, Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee. } No. 517.

Petition of appellants for rehearing.

Now come appellants, Daniel A. Camfield and William Drury, and petition the court for a rehearing of the above-entitled cause for the following reasons:

I.

The constitutionality of the act of Congress of February 25, 1885, 23 Stat., 321, ch. 149, is drawn in question in this case; hence this court is without jurisdiction of this appeal.

32 II.

If the court should determine that it has jurisdiction of this appeal, the questions involved and necessarily determined in this case

are of gravity and importance, not only to appellants, but to the Government and all citizens who are, or may contemplate becoming, interested in any part of this country where there is still Government land undisposed of; these questions have been determined differently by different courts, some of which are not within the territorial jurisdiction of this court, and are not bound by the decisions thereof; it is desirable to all parties concerned that the questions here involved be settled permanently and for all localities and parties alike.

Wherefore petitioners pray for a rehearing of this cause; that the judgment rendered herein be set aside and the appeal dismissed for want of jurisdiction; or that the cause be certified to the Supreme Court of the United States.

DANIEL A. CAMFIELD AND
WILLIAM DRURY,
By JAS. W. McCREERY,
A. C. PATTON,
H. E. CHURCHILL,
CHAS. W. BATES,
Their Solicitors.

We, counsel for appellants, Daniel A. Camfield and Wilham Drury, certify that the above petition is made in good faith and in the interest of justice and in our opinion is well founded in law.

JAMES W. McCREERY.
A. C. PATTON.
H. E. CHUCHILL.
CHAS. W. BATES.

33 We beg leave to submit the following statement in support of the foregoing petition:

I.

The appeal was inconsiderately taken to this court.

That it was so taken is due to the fact that the provision of the act of Congress of March 3, 1891, 26 Stat. 826, ch. 517, which provides that appeals shall be taken to the Supreme Court in all cases in which the constitutionality of any law of the United States is drawn in question was inadvertently overlooked and was not thought of or suggested until after the cause was argued and submitted to this court, when the attention of one of the judges in chambers was called to the matter.

Counsel feel the awkwardness of their position in now suggesting to the court its want of jurisdiction, and make the foregoing statement lest their silence draw upon themselves suspicion of attempting to deal unfairly with the court.

The constitutionality of the act of Congress upon which this proceeding by the Government is based is drawn in question as shown by the record. The appeal should have been taken to the Supreme Court in accordance with section 5, of the act of March 3, 1891, and this court has no jurisdiction thereof.

II.

But if the court be of opinion that it has jurisdiction of this appeal we must earnestly press upon the consideration of the court the importance and gravity of the questions involved in this case.

34 It involves the right to the beneficial use and enjoyment of private property. This case must determine whether a citizen to whom the Government itself has granted land, who has paid the price demanded, who bought without any reservation on the part of the grantor, the Government, of the right to restrict his use of the land bought—a use which had never been questioned till long after the grant—who bought without any notice that his right to the beneficial enjoyment thereof was denied, who bought the fee with all that term implies in American law, who was encouraged to buy, locate and live upon the land as a home and to use the same as a means of livelihood for himself and family, who cannot cultivate it at all or even pasture it without doing so in common with all others unless he fences it (and to fence one's own land wherever it may be situated is not now and never has been a nuisance)—whether such citizen is to be told by the Government which has voluntarily sold him land surrounding that retained by the Government, that he can pasture his own land (unfenced and hence in common with all others, and the Government allows him to do that without buying it) but can put no improvements on it or cultivate it or use it in any way which requires a fence, or to fence it at all, because the Government owns land surrounded by his.

If such is done it is confiscation, it is taking private property without compensation, it is taking private property for private use of another.

There is no question here affecting any public function of government.

If a public road is required the law provides a method for condemning the necessary land for that purpose.

If a private right of way is required such exists by the voluntary acts of the appellants.

But again the Government desires the settlement of its lands, and is very liberal, and has been prodigal, in the inducements held out to accomplish this purpose.

35 Particularly is it anxious that the land be used as homes; that its citizens enjoy the land and employ their industry thereon; but if the right to use the land in the only way it can be used is taken away, who will—who is able to—buy, when to do so is to invest money in an open range to which he has no more right than he had before he bought or than any one else has?

Nor can it make any difference so far as this case is concerned, whether the amount of land owned by the citizen is great or small; whether the fence on his own land is long or short.

There is a principle involved which is far more important than its particular application in any one case.

The statute makes no such discrimination. The law permits the citizen to buy all the land he chooses or can pay for.

If the act of Congress is a constitutional enactment its construction is a matter of great moment.

There is a vast territory embracing many States throughout the entire length and breadth of which the principle involved in this case is of vital importance.

The Government has millions of acres of land which it is desirous of disposing of to the end that its citizens may utilize, enjoy and develop the land, better themselves, and build up and maintain the nation itself.

The gravity to the Government of the questions involved in this case is unquestioned.

There are thousands, nay, we may say millions, of citizens affected by and vitally interested in the questions to be determined in this case.

For the above reasons, and they might be indefinitely enlarged upon, this case involves questions of grave public concern.

A large part of the country in which just such a case as this may at any time arise, and in which the questions here involved
36 are living issues of every-day life, is not within the territorial jurisdiction of this court, and therefore the courts therein situated are not bound by the decisions of this court.

The decisions in the various localities are not uniform.

The construction placed upon the act of Congress of February 25, 1885, by the court sitting in California, restricts the operation of the statute to fences which are not on land owned by the individual, nor on land to which he has a *bona fide* claim, holding that although a part of the Government land is enclosed the act does not apply where the fence is situated on land owned or claimed *bona fide* by the builder of the fence.

U. S. *vs.* Brandestein, 32 Fed Rep., 738.

Just in proportion to the importance of the question is the importance of a final and uniform determination thereof for all alike.

Respectfully submitted.

JAS. W. McCREERY,
A. C. PATTON,
H. E. CHURCHILL,
CHAS. W. BATES,
Solicitors for Appellants, Daniel A. Camfield and William Drury.

Endorsed: Filed Mar. 12, 1895. John D. Jordan, clerk.

37 And on the eighteenth day of March, A. D. 1895, an opinion on said petition for a rehearing was filed in said cause in the following words:

Opinion on Petition for Rehearing.

38 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1894.

DANIEL A. CAMFIELD and WILLIAM DRURY, Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee. } No. 517.

Appeal from the circuit court of the United States for the district of Colorado.

Before Caldwell, Sanborn, and Thayer, circuit judges.

Per Curiam:

A motion for a rehearing has been filed in this case based on two grounds: First, that this court has no jurisdiction of the case on appeal, because the case involved the constitutionality of an act of Congress, and second, because the case is one of great importance.

With reference to the first point, it may be said that the record lodged in this court did not disclose any constitutional question. In the circuit court the Government excepted to the sufficiency of a certain defense which was pleaded in the answer. The exception was sustained, whereupon, for failure on the part of the defendants to plead further, a decree was entered in favor of the United States. The defendants then prayed an appeal to this court, and assigned for error that the circuit court erred in sustaining the exceptions to the answer. The validity of the act of Congress of February 25, 1885, 23 Stat. 321, ch. 149, was not challenged by the assignments of error nor by counsel for the appellants, either in their oral or written argument.

With reference to the second point of the motion, it will suffice to say that while the case may be, and doubtless is, one of much importance to the appellants, yet it is not suggested that the court has overlooked any consideration or authority which should have had weight in the decision of the cause. Inasmuch as the case arises under the Constitution and laws of the United States, and the decision thereof by this court is not made final by section 6 of the act of March 3, 1891, 26 Stat. 826, ch. 517, no reason is perceived why a rehearing should be granted, and the motion in that behalf is, therefore, denied.

Filed March 18, 1895.

39 And on the eighteenth day of March, A. D. 1895, in the record of the proceedings of the December term, A. D. 1894, of said court is an order denying said petition for a rehearing in the following words, to wit:

Order Denying Petition for Rehearing.

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1894.

DANIEL A. CAMFIELD *et al.*, Appellants,
vs.
THE UNITED STATES, Appellee. } No. 517.

Appeal from the circuit court of the United States for the district of Colorado.

MONDAY, *March* 18, 1895.

This cause came on this day to be heard on the petition filed by the appellants for a rehearing, and the court having considered the same and being fully advised in the premises, it is now ordered that said petition for a rehearing in this cause be, and the same is hereby, denied.

And on the twenty-third day of April, A. D. 1895, a petition of appellants for the allowance of an appeal to the Supreme Court of the United States was filed in said cause in the following words, to wit:

Petition for Appeal.

United States Circuit Court of Appeals, Eighth Circuit.

DANIEL A. CAMFIELD and WILLIAM DRURY,
Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee. } In Equity. No. 517. Petition on Appeal.

40 The above-named appellants, conceiving themselves aggrieved by the decree made and entered in the above-entitled cause, do hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith, and they pray that this appeal may be allowed and that a transcript of the record, proceedings, and papers, duly authenticated, may be sent to the Supreme Court of the United States.

April 23, 1895.

DANIEL A. CAMFIELD AND
WILLIAM DRURY,
By CHAS. W. BATES,
Their Attorney.

Endorsed: No. 517. United States circuit court of appeals, eighth circuit. Daniel A. Camfield, William Drury *vs.* United States of America. Petition on appeal. Filed April 23, 1895. John D. Jordan, clerk.

And on the twenty-third day of April, A. D. 1895, an assignment of errors was filed in said cause in the following words, to wit:

Assignment of Errors.

United States Circuit Court of Appeals, Eighth Circuit.

DANIEL A. CAMFIELD and WILLIAM DRURY, Appellants, *vs.* THE UNITED STATES OF AMERICA, Appellee. } In Equity. No. 517. Assignment of Errors.

And now, on this twenty-third day of April, 1895, come the said appellants, by Charles W. Bates, their solicitor, who says that the decree in said cause is erroneous and against the just rights of said appellants for the following reasons:

First. The court erred in sustaining appellee's objections and exceptions to the answer of the appellants.

41 Second. The court erred in holding that the answer of appellants herein was and is insufficient to constitute a defense to appellee's complaint.

Third. The court erred in giving a judgment and decree in favor of appellee.

Fourth. The court erred in refusing to dismiss appellee's bill herein for want of law and equity to sustain it.

Fifth. The appellee has no ground of action or suit except upon the act of Congress approved Feb. 25, 1885, entitled "An act to prevent unlawful occupancy of the public lands," which act is unconstitutional and void.

Wherefore said appellants pray that said decree be reversed and that the bill of appellee be directed to be dismissed.

CHAS. W. BATES,
Solicitor for Appellants.

Endorsed: No. 517. United States circuit court of appeals, eighth circuit. Daniel A. Camfield, William Drury *vs.* United States of America. Assignment of errors. Filed April 23, 1895. John D. Jordan, clerk.

And on the twenty-third day of April, A. D. 1895, an appeal bond was filed in said cause in the following words, to wit:

Bond on Appeal.

Know all men by these presents that we, Daniel A. Camfield and William Drury, are held and firmly bound unto the United States of America in the full and just sum of twenty-five hundred dollars, to be paid to the said United States of America, heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of April, in the year of our Lord one thousand eight hundred and ninety-five.

42 Whereas lately, at the December term, A. D. 1894, of the circuit court of appeals of the United States for the eighth circuit, in a suit depending in said court between Daniel A. Cam-

field and William Drury, appellants (plaintiff-), and The United States of America, defendant, a decree was rendered against the said Daniel A. Camfield and William Drury, and the said Daniel A. Camfield and William Drury have obtained an appeal from the decree of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing it to be and appear in the Supreme Court of the United States, at the city of Washington, D. C., thirty days from and after the date of said citation:

Now, the condition of the above obligation is such that if the said Daniel A. Camfield and William Drury shall prosecute said appeal to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

DANIEL A. CAMFIELD. [SEAL.]
WILLIAM DRURY. [SEAL.]

Sealed and delivered in presence of—
—— ——.

Approved by—
AMOS M. THAYER,
Circuit Judge, 8th Circuit.

STATE OF COLORADO, } ss:
County of Weld, }

Daniel A. Camfield, one of — sureties on the within bond, being duly sworn, for himself deposes and says that he is worth, after paying his just debts, the sum of ten thousand dollars, exclusive of property exempt from execution by the laws of the State in which he resides.

DANIEL A. CAMFIELD.

[SEAL.] Subscribed and sworn to before me by the above-named Daniel A. Camfield this 8th day of April, 1895. My com. expires Oct. 1, 1898.

CHARLES D. TODD,
Notary Public.

43 STATE OF ILLINOIS, } ss:
County of Mercer, }

William Drury, *and* being first duly sworn for himself, deposes and says that after paying his just debts he is worth the sum of ten thousand dollars, exclusive of property exempt from execution by the laws of the State in which he resides.

WILLIAM DRURY.

[SEAL.] Subscribed and sworn to before me this 10th day of April, A. D. 1895. My com. expires March 4, 1896.

FRED. P. BURGETT,
Notary Public.

Approved April 28th, 1895.
MOSES HALLETT, *Dist. Judge.*

Endorsed: No. 517. United States circuit court of appeals, eighth circuit. Daniel A. Camfield, William Drury *vs.* United States of America. Bond on appeal. Filed Apr. 23, 1895. John D. Jordan, clerk.

And on the 23rd day of April, A. D. 1895, in the record of the proceedings in said circuit court of appeals is an order allowing appeal in said cause in the following words, to wit:

Order Allowing Appeal.

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1894.

DANIEL A. CAMFIELD and WILLIAM A. DRURY, Appellants, *vs.* THE UNITED STATES OF AMERICA, Appellee.	No. 517. Appeal from the Circuit Court of the United States for the District of Colorado.

TUESDAY, *April* 23, 1895.

On motion of Mr. Charles W. Bates, counsel for appellants, it is ordered that an appeal from the decree of this court in this cause be, and the same is hereby, allowed to the Supreme Court of
44 the United States, and the bond in the penal sum of twenty-five hundred dollars this day filed is hereby approved to operate as a supersedeas.

And on the 18th day of May, A. D. 1895, the original citation issued in said cause, with the proof of service endorsed thereon, was filed in the clerk's office of the United States circuit court of appeals, the original of which is hereto attached and herewith returned in the following words:

Citation.

45 THE UNITED STATES OF AMERICA:

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, D. C., thirty days from and after the day this citation bears date, pursuant to an appeal filed in the clerk's office of the circuit court of appeals for the eighth circuit, wherein Daniel A. Camfield and William Drury are appellants *is* and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Amos M. Thayer, judge of the United States circuit court of appeals for the eighth circuit, this 23rd day of April, in the year of our Lord one thousand eight hundred and ninety-five.

AMOS M. THAYER,
Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] No. 517. United States circuit court of appeals eighth circuit. Daniel A. Camfield, William Drury *vs.* United States of America. Citation on appeal. Filed May 18, 1895. John D. Jordan, clerk.

DISTRICT OF COLORADO, *ss:*

I have duly executed the within writ by delivering a true copy of the same to Henry V. Johnson, Esq., U. S. attorney for the district of Colorado, this 16th day of May, A. D. 1895, at Denver, Arapahoe county.

J. A. GRAEL,
U. S. Marshal,
By J. S. WARWICK,
Deputy Marshal.

Marshal's fees—1 service, 2.00—paid by appellants.

46 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the above-named court, do hereby certify that the foregoing pages from 1 to 46, inclusive, contain a full, true, and complete transcript of all the pleadings, proceedings, and record entries, including the opinions of said circuit court of appeals, in a certain cause wherein Daniel A. Camfield and William Drury are appellants and The United States of America appellee, No. 517, December term, A. D. 1894.

I further certify that the original citation, with the proof of service endorsed thereon, is hereto attached and herewith returned as a part of this transcript.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at my office, in the city of St. Louis, Missouri, in the eighth circuit, this 18th day of May, A. D. 1895.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Endorsed on cover: Case No. 15,912. U. S. circuit court of appeals, eighth circuit. Term No., 278. Daniel A. Camfield and William Drury, appellants, *vs.* The United States. Filed May 23, 1895.

167-578

167-578

Supreme Court, U. S.
FILED.
MAR 25 1897
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 278.

DANIEL A. CAMFIELD AND WILLIAM DRURY,
Appellants,
vs.
THE UNITED STATES,
Appellee.
No. 15,912.

STATEMENT AND BRIEF FOR APPELLANTS.

JAS. W. McCREERY,
CHAS. W. BATES,
for Appellants.

BUXTON & SKINNER STATIONERY CO., St. Louis, Mo.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 278.

DANIEL A. CAMFIELD AND WILLIAM DRURY,
Appellants,
vs.
THE UNITED STATES,
Appellee.
No. 15,912.

STATEMENT OF FACTS.

This is a civil suit instituted in the name of the United States of America by the district attorney for the District of Colorado against defendants, Daniel A. Camfield and Wm. Drury, for the purpose of having declared unlawful a fence described in the bill, and seeking a decree of court for the removal of said fence, under the provisions of an act of Congress, approved Feb. 25th, 1885, entitled,

"An act to prevent unlawful occupancy of the public lands." 23 Stat. L. 321, chapter 149; supplement to Revised Statutes of the United States, vol. 1, 2d edition, 477.

Section 1. That all enclosures of any public lands in any State or Territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the enclosure the person, party, association, or corporation making or controlling the enclosure had no claim or color

of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such enclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction or control of any such enclosure is hereby forbidden and prohibited;

And the assertion of a right to the exclusive use or occupancy of any part of the public lands of the United States in any State or any of the Territories of the United States, without claim, color of title, or asserted right as above specified as to enclosure, is likewise declared unlawful and hereby prohibited.

Sec. 2. That it shall be the duty of the district attorney of the United States for the proper district, on affidavit filed with him by any citizen of the United States that section one of this act is being violated, showing a description of the land enclosed with reasonable certainty, not necessarily by metes and bounds, nor by governmental subdivisions of surveyed lands, but only so that the enclosure may be identified, and the persons guilty of the violation as nearly as may be, and by description, if the name cannot on reasonable inquiry be ascertained, to institute a civil suit in the proper United States District or Circuit Court, or Territorial District Court, in the name of the United States, and against the parties named or described who shall be in charge of or controlling the enclosure complained of as defendants;

And jurisdiction is also hereby conferred on any United States District or Circuit Court or Territorial District Court having jurisdiction over the locality where the land enclosed, or any part thereof, shall be situated, to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of this act; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the enclosure;

And any suit brought under the provisions of this section shall have precedence for hearing and trial over other cases on the civil docket of the court, and shall be tried and determined at the earliest practicable day.

In any case if the enclosure shall be found to be unlawful, the court shall make the proper order, judgment, or decree for the destruction of the enclosure, in a summary way, unless the enclosure shall be removed by the defendant within five days after the order of the court.

Sec. 3. That no person, by force, threats, intimidation, or by any fencing or enclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceable entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands:

Provided, This section shall not be held to affect the right or title of persons, who have gone upon, improved or occupied said lands under the land laws of the United States, claiming title thereto, in good faith.

Sec. 4. That any person violating any of the provisions hereof, whether as owner, part owner, agent, or who shall aid, abet, counsel, advise, or assist in any violation hereof, shall be deemed guilty of a misdemeanor, and fined in a sum not exceeding one thousand dollars and be imprisoned not exceeding one year for each offence.

Sec. 5. That the President is hereby authorized to take such measures as shall be necessary to remove and destroy any unlawful enclosure of any of said lands, and to employ civil or military force as may be necessary for that purpose.

Sec. 6. That where the alleged unlawful enclosure includes less than one hundred and sixty acres of land, no suit shall be brought under the provisions of this act without authority from the Secretary of the Interior.

Sec. 7. That nothing herein shall affect any pending suits to work their discontinuance, but as to them hereafter they shall be prosecuted and determined under the provisions of this act.

The bill, which was filed June 16th, 1893, in the United States Circuit Court for the District of Colorado, in substance sets out the ownership in the United States of public lands in Colorado therein particularly described by sections, avers the

Record 1.

R. 2. policy of the United States to develop and utilize the public domain by permitting and encouraging the pasturage of sheep, cows, horses and other domestic animals on the unappropriated public lands by citizens in common, subject to the rights of entry upon and appropriation of said lands under the acts of Congress. That it is also the policy of the United States to sell its public domain to its citizens to increase the public revenues and to encourage settlement by affording cheap homes. That the defendants, Daniel A. Camfield and William Drury, wrongfully, designing and attempting to en-
R. 3. croach and intrude upon the public lands and monopolize the use of the same, had, prior to the institution of this suit and on or about the first day of January, 1893, built, constructed and maintained a fence which enclosed and included about twenty thousand acres of the public domain. That the effect of such fence is to exclude persons who have a right to go upon the same.

A description of said public domain alleged to be so enclosed is then given by sections.

The bill further alleges that these lands are very valuable for the purpose of pasturage and agriculture and that the inclosure tends and will tend to hinder, delay and prevent the sale of said lands by the United States and location thereof by settlers and the use thereof by citizens for pasturage.

R. 4. That the maintenance of this fence is a great and irremediable public injury and public nuisance and results in a purpresture and unlawful appropriation by the defendants of the public domain.

The bill then describes the fence, as shown by a plat filed with the petition and made a part thereof. (From which plat the same being attached to this statement it is shown that the fence is erected entirely upon the odd numbered sections; none of it being upon the even numbered sections; the red lines indicating the location of the fence.)

The bill further avers that the land is within the limits of the grant made to the Union Pacific Railroad Company by the act of Congress of July 1st, 1862, entitled, "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean * * * ," and acts amendatory to said act.

That the public lands enclosed by the fence are the even numbered sections which lie adjacent to the odd numbered sections granted to said company. The bill avers that the defendants, Daniel A. Camfield and Wm. Drury, claim to have procured from said railroad company the right to the use of the sections granted to said company either by purchase or lease, "and so claiming the right to use the said odd sections owned by the said railroad company, they have built their fence entirely upon said odd sections, the same being removed a few inches inside the line dividing the railroad company's sections and those belonging to your orator (United States) * * * ." "That the said Daniel A. Camfield and William Drury justified the enclosure, heretofore charged, by alleging that their fence is built entirely upon lands not belonging to your orator, and that your orator has no right to interfere with the same." R. 5.

The bill then charges that the defendants' acts are, however, but an attempt to evade the law and results in the enclosure of public domain.

The bill then prays, among other things, that the defendants, their agents and representatives be ordered and decreed to absolutely remove and abate the fence heretofore described, and that an injunction be granted restraining and forbidding the defendants, their officers, employes and assigns from in any manner keeping up, maintaining, upholding or using any part or portion thereof.

Defendants entered their appearance to this suit and filed an answer which averred in substance, as follows: R. 7.

That the defendant, Wm. Drury, had purchased from the Union Pacific Railway Company, and had entered into the possession of all the odd numbered sections in townships seven and eight, north of range sixty-three, west of the sixth principal meridian, which is the land upon which the fence is charged in the bill to have been erected and maintained. That the lands lie adjacent to Crow Creek, which is a natural stream R. 8.

of water running through this portion of the State of Colorado, and that all the lands mentioned in the bill and in the answer are arid lands and incapable of cultivation without irrigation. That Crow Creek is the only stream available to supply water for the irrigation of the described lands. That the defendants have undertaken to build large reservoirs for water to be supplied from said Crow Creek for the irrigation of said lands and other lands in that neighborhood. That the defendants
R. 9. have proceeded in accordance with the act of Congress in acquiring the necessary sites, etc., to be used in the construction of said reservoirs, and have filed maps with the Secretary of the Interior as required by the act of Congress, and have expended large sums of money in the actual construction of this improvement. That they intend to supply water by means of said reservoirs to the lands in that neighborhood and to those who shall occupy said lands. That both the defendants, Camfield and Drury, are interested in contributing to the construction of said reservoirs, covering an area of 800 acres, which, when completed, will have a sufficient capacity for the storage of water for the irrigation of 30,000 acres of land never heretofore and not otherwise capable of being brought under irrigation, and that said lands, both of the United States of America and of the defendants will thereby be made valuable.

That the fences erected by the defendants are entirely upon their own land.

That at each corner section defendants have constructed in the fence a swinging gate sixteen feet in length, affording free and easy passage to all who may desire to pass over said land.

That by reason of the improvements aforesaid, large numbers of citizens have been directed to this neighborhood and have signified their intention of purchasing the public lands,
R. 10 though prior to the inception of the enterprise described, the settlement of said lands had been largely discontinued, but that much of the land had been taken up, particularly along the streams, whereby the value of the lands for the ranch industry had been greatly depreciated and large herds could no longer be accommodated, either as to pasturage or water, and in consequence thereof the stock industry had been rapidly driven out; and that the revenue of the United States will be largely increased by the improvements erected by defendants through the pur-

chase of lands by those who desire the use of the same in connection with the water intended to be supplied by defendants; and that the national wealth and the supply of raw material will be largely enhanced.

Defendants denied that they had wrongfully attempted, encroached or entered upon the lands of the United States or monopolized the use of the same, and that they had in any manner interfered with the use of the public lands or the settlement thereof or with revenues derived therefrom; that they had or that their acts would tend to hinder or prevent the sale or location of said public lands, and charged that, on the contrary, settlements would be thereby encouraged. They desired that any damage had been caused or would be caused by any of the acts of defendants; and denied that the fence constituted a nuisance or resulted in a purpresture or appropriation of the public domain, and denied all manner of combination and confederacy wherewith they were charged in the bill. R. 11.

To this answer plaintiff excepted on the ground of insufficiency, "for that said answer does not state facts sufficient to constitute a defense to the matters and things alleged in plaintiff's complaint herein." R. 12.

The Circuit Court sustained said exceptions.

Defendants refusing to plead further, but electing to stand on their original answer, the bill of complaint was taken as confessed and decree was entered, R. 14.

"That the said defendants do absolutely remove and abate the fences described in the complaint (describing the same * * *).

"And that said defendants do so absolutely remove and abate said fences and every part and parcel thereof within thirty days after the date of this decree; and that they, their assigns, agents, assistants and employees, and each and every of them be and hereby are forever and absolutely enjoined and restrained from keeping, maintaining, upholding, or supporting said fences and barriers, or any part or parcel thereof, or any fences or barriers on any part of the public domain not appropriated by them according to law; and in case said fences are not utterly abated and removed within the time aforesaid, the marshal of the United States, within and for R. 15.

the District of Colorado, is hereby directed to abate and remove the same at the cost of said defendants * * *."

R. 17. From this decree defendants took an appeal to the United States Circuit Court of Appeals, Eighth Circuit.

Judgment was rendered by the Circuit Court of Appeals, Feb. 20, 1895, during the December term, 1894, affirming the decree of the Circuit Court for the District of Colorado.

R. 20, 24. Motion for rehearing was duly filed by defendants March 12, 1895, and was denied by the court March 18, 1895.

R. 29-32. April 23, 1895, appellants prayed for an appeal to the Supreme Court, filed assignment of errors, and appeal bond which was duly approved, and appeal allowed.

R. 30.

ASSIGNMENT OF ERRORS.

1st. The court erred in sustaining appellee's objections and exceptions to the answer of appellants.

2d. The court erred in holding that the answer of appellants herein was and is insufficient to constitute a defense to appellee's complaint.

3rd. The court erred in giving judgment and decree in favor of appellee.

4th. The court erred in refusing to dismiss appellee's bill herein for want of law and equity to sustain it.

5th. The appellee has no ground for action or suit except upon the act of Congress approved Feb. 25th, 1885, entitled "An act to prevent unlawful occupancy of the public lands," which act is unconstitutional and void.

32. The appeal was duly perfected and the record filed in this court May 23, 1895.

We contend that the decree is erroneous, because:

First, the act of Congress of Feb. 25, 1885, upon which the decree is based, is unconstitutional to the extent that it prohibits the erection or maintenance of fences upon private land in a state.

Second, said act if constitutional must be so construed as not to apply to fences upon private property.

The following preliminary questions arise:

First, has the Supreme Court jurisdiction of this appeal?

Second, are the questions of the constitutionality and construction of the act of February 25, 1885, before this Court for determination?

JURISDICTION.

This suit was brought under the act of Congress of Feb. 25th, 1885, by the United States as plaintiffs or petitioners in the Circuit Court for the District of Colorado, and appealed by defendants to the Circuit Court of Appeals for the Eighth Circuit from the decree of the Circuit Court, and from the judgment of the Circuit Court of Appeals affirming the judgment of the trial court in favor of the United States defendants appealed to the Supreme Court.

Of course, there is no question but that the case was properly brought in the Circuit Court of the United States. Act of Congress of Feb. 25th, 1885, sec. 2.

The record in the trial court determines, under the acts of Congress providing for appeals, to which court the appeal should be taken.

The record raises two questions:

First: The sufficiency as a matter of law of the bill, its averments being taken *pro confesso*, to support or justify the decree.

Second: The sufficiency as a matter of law of the answer, exceptions to which were sustained on the ground that the averments of fact did not constitute a defense.

The first question involves the consideration of the act of Congress of February 25th, 1885, under which the bill was filed, in its relation to the Constitution of the United States—its constitutionality—and in its relation to the fence erected and maintained by defendants wholly upon their own land situated in the State of Colorado—its construction, interpretation or application.

The second question, while it involves the same considerations as the first, involves, also, another consideration, viz: the intention and good faith of defendants in erecting and maintaining the fence complained of.

As shown hereafter these matters are open for argument on this record on appeal, and *a fortiori*, they were open for argument in the trial court.

While these are the questions of law involved upon the merits of this controversy upon the facts shown by the record in the trial court, the record does not show that the constitutional question was expressly presented to the trial court or considered by it.

The opinion delivered by the trial court *may* indicate that such question was considered, as it expressly disapproved the case of United States vs. Douglas-Willan-Sartoris Co., 3 Wyo., 288, in which case one of the three judges held the act of Congress of February 25th, 1885, applicable to a fence wholly upon defendants' land and hence unconstitutional; another of the judges held the act inapplicable to such fence, because if the act was so construed as to make it applicable, it would be unconstitutional. The opinion, however, does not show that such question *was in fact* raised or considered.

It would be useless to look to the assignment of errors filed. An assignment of errors cannot be availed of to import questions into a case which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to the Supreme Court under the 5th section of the act of March 3d, 1891.

Cornell v. Green, 163 U. S., 75, 80.
Ansbro v. United States, 159 U. S., 695, 698.

The appellate jurisdiction of the Supreme Court, as well as of the Circuit Courts of Appeals, is determined by Congress.

Constitution, Art. 3, Sec. 2.
Colorado Central Min. Co. v. Turck, 150 U. S., 138, 141.
American Construction Co. v. Jacksonville, etc., Ry. Co., 148 U. S., 372, 378.
Wiscart v. D'Auchy, 3 Dall., 321, 327.

The primary object of the act of March 3d, 1891, was to relieve the Supreme Court; and to accomplish this object created the Courts of Appeals, and distributed the entire appellate jurisdiction over Circuit and District Courts of the United States.

American Construction Co. v. Jacksonville, etc., Ry. Co., 148 U. S., 372, 382.
United States v. American Bell Telephone Co., 159 U. S., 548, 551.

Appellate jurisdiction of this case depends upon sections 5 and 6 of said act of March 3, 1891.

Section 5 so far as applicable to this case is as follows:

"That appeals, or writs of error, may be taken from the "District Courts, or from the existing Circuit Courts, direct to "the Supreme Court in the following cases:

* * * * * *

"In any case that involves the construction or application "of the Constitution of the United States.

"In any case in which the constitutionality of any law of "the United States, or the validity or construction of any treaty "made under its authority is drawn in question.

* * * * * * "

Section 6, so far as applicable, is as follows:

"That the Circuit Courts of Appeals established by this act "shall exercise appellate jurisdiction to review by appeal or "writ of error final decisions in the District Court or existing "Circuit Courts in all cases other than those provided for in "the preceding section of this act, unless otherwise provided "by law; judgments or decrees of the Circuit Courts of Appeals "shall be final in all cases in which the jurisdiction is depend-"ent entirely upon the opposite parties to the suit or contro-"versy being aliens and citizens of the United States, or citi-"zens of different States; also in all cases arising under the "patent laws, under the revenue laws, under the criminal laws "and in admiralty cases.

* * * * * *

"In all cases not hereinbefore, in this section, made final, "there shall be of right an appeal or writ of error to review "the case by the Supreme Court of the United States where "the amount in controversy shall exceed one thousand dollars "besides costs."

By the terms of section 6 if this case was not properly appealable to the Supreme Court under section 5, it was properly taken in the first instance to the Circuit Court of Appeals.

It is only when the constitutionality of a law of the United States is drawn in question, not incidentally, but necessarily and directly, that jurisdiction of the Supreme Court can be invoked for that reason. It is not enough that the questions or objections raised on the record *may* depend on the constitutionality or unconstitutionality of a law, but the record must show *affirmatively* that such was presented to and was before the trial court.

Ansbro v. United States, 159 U. S., 695, 698.
See also Borgmeyer v. Idler, 159 U. S., 408.

In order to give the Supreme Court jurisdiction on the ground that the case involves the construction or application of the Constitution of the United States, the record must affirmatively show that the right, title, privilege or immunity claimed in the court below was claimed under the Constitution and a definite issue on that instrument presented. The fact that the right, title, privilege or immunity was claimed is not enough, for the decision of the case may have rested on some other provision of law or practice. The court below must have at least been asked to construe or apply the Constitution and the record must affirmatively show it. The constitutional question must have been raised at the trial. The Circuit Court must have construed the Constitution or applied it to the case, or at least must have been so requested and declined or omitted so to do.

Cornell v. Green, 163 U. S., 75, 78 et seq.
Ansbro v. United States, 159 U. S., 695, 697, 698.

The record in this case does not meet the requirements necessary to give the Supreme Court jurisdiction of the appeal from the Circuit Court and the case was for these reasons properly taken to the Circuit Court of Appeals.

This is a case in which the judgment of the Circuit Court of Appeals is not final, but from which an appeal lies to the Supreme Court if the matter in controversy exceeds $1,000 besides costs.

Act of Congress of March 3, 1891, Sec. 6, 26 Stat. at large, 826.

United States v. American Bell Telephone Co., 159 U. S., 548.

Huntington v. Saunders, 163 U. S., 319.

The matter in controversy is the defendants' possession, use and occupation of their land.

Cameron v. United States, 148 U. S. 301, 304; S. C. 146 U. S., 533.

See also Abadie v. United States, 149 U. S., 261.

PRACTICE.

The Supreme Court having jurisdiction of the appeal the only other questions, before consideration of the case upon its merits, are those of practice.

Except in cases where certain questions only are certified to the Supreme Court, as in cases where the jurisdiction of the trial court is in issue, and except in cases from State Courts where Federal questions only are reviewed, jurisdiction of the appeal on any ground vests in the Supreme Court jurisdiction to determine all questions involved in the case.

Chappell v. United States, 160 U. S. 499, 509.

Horner v. United States, 143 U. S. 570, 577.

In a prosecution under the act of Congress providing punishment for violation of the neutrality laws, resulting in the conviction of the defendants, it was not shown in the trial court, as appeared from the record, that two of the defendants had knowledge of the purpose (unlawful purpose) of the expedition of the vessel of which they were mates. This court, in reversing the lower court on that ground, although the point was not raised in the court below, said:

"Although this question was not properly raised, yet if "a plain error was committed in a matter so absolutely vital "to defendants we feel ourselves at liberty to correct it."

Wiborg v. United States, 163 U. S., 632, 658.

This court, in reversing a decree in equity of the trial court, said:

"———— On an appeal in an equity suit, the whole "case is before us, and we are bound to decide it so far as it is "in a condition to be decided. The bill was dismissed on de- "murrer for want of jurisdiction. Though the court below "may have erred in dismissing it on this ground, yet if we can "see that there is any other ground on which it ought to be "dismissed, for example, want of equity on the merits, we "must affirm the decree. This makes it necessary that we "should go into a further examination of the case made by the "bill and supplemental bill."

Ridings v. Johnson, 128 U. S., 212, 218.

In the case at bar exceptions to defendants' answer, on the ground of insufficiency were sustained by the trial court, and upon their declining to plead further the bill was taken *pro confesso*, and a decree directing the removal of the fence maintained by defendants upon their own land was rendered.

The sufficieny of the bill taken *pro confesso* may be contested by defendants on appeal; likewise they may insist that the averments do not justify the decree.

Central R. R. Co. v. Central Trust Co., 133 U. S. 83, 91.

The only decree authorized upon taking a bill *pro confesso* is such as on the facts confessed the law justifies.

Rule 18, Equity Rules.
Thomson v. Wooster, 114 U. S., 104, 113.

The objection that on the facts averred in the bill it is not competent for the court to grant the relief decreed is always open.

Reynes v. Dumont, 130 U. S., 354, 395, and citations.
Brown v. Lake Superior Iron Co., 134 U. S., 530, 536.

Where the facts (appearing either by bill taken *pro confesso* or by proof) do not make a proper cause for equity, the Supreme Court will reverse a decree founded thereon though objection is made for the first time in the Supreme Court.

Allen v. Pullman's Palace Car Co., 139 U. S., 658, 662, and citations.

The constitutionality of a statute is a question of law and not of fact.

Walnut v. Wade, 103 U. S., 683, 688, 689.
Post v. Supervisors, 105 U. S., 667, 668.

The constitutionality and the construction or application of the act of Congress of February 25, 1885, under the provisions of which the bill was filed and the decree rendered, are therefore before this court. The bill and the decree are based entirely upon this act of Congress and stand or fall as it stands or falls.

"An unconstitutional act is not a law; it confers no rights; "it imposes no duties; it affords no protection; it creates no "office; it is, in legal contemplation, as inoperative as though "it had never been passed."

Norton v. Shelby County, 118 U. S., 425, 442.

UNCONSTITUTIONALITY OF THE ACT OF FEB. 25, 1885.

It is averred both in the bill and answer that the land upon which the fence is built does not belong to the United States, is not a part of the public domain, but was granted by the United States to the Union Pacific Railroad Company from whom defendants purchased it. It is private property situated in the State of Colorado. No public function of government except that touching public lands belonging to the United States is shown by the bill or claimed by the United States.

The grant of this land was a grant *in presenti* and the title and right of property passed to and vested in the grantee.

Noble v. Union River, etc., R. R., 147 U. S. 165, 172.
Railway Co. v. Alling, 99 U. S. 463, 475.
M., K. & T. R. R. v. K. P. R. R., 97 U. S. 491, 496.
United States v. S. P. R. R., 146 U. S. 570, 593.

This land is private property (and it is so averred in the bill), although it was originally granted by the United States, and it cannot by the act of February 25, 1885, or by any other act, be legislated back to the United States. And it is said in the majority of opinion in the Sinking Fund cases, "They (United States) cannot legislate back to themselves, without making compensation, the lands they have given this corpora-

tion (Union Pacific Railroad Company) to aid in the construction of its railroad."

> Sinking-Fund cases, 99 U. S. 700, 719.
> See also Cameron v. United States, 148 U.S. 301, 309-310 and citations.

At all events, the bill avers that the fence is not built upon land belonging to the United States, but that every part of it is wholly upon the private property of appellants.

While it is true, as said in Shively v. Bowlby, 152 U. S. 1, 10, that "All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant beyond what such grant by necessary and unavoidable construction shall take away," still it has never been questioned but that the beneficial ownership and entire interest in the land passes to the grantee of public lands. This much such grant does "by necessary and unavoidable construction take away."

This is the meaning of the grant—this is the grant—this is the meaning of ownership.

The rule quoted does not define or curtail the ordinary common law or statutory rights of ownership in or to the thing granted, nor does it affect one way or the other the power of Congress over private property.

The grant of land, as in the case cited (and as we contend at bar), did not change the law applicable to the rights of the individual and of the public in such land, the title to which became vested in the individual. In other words, the law defining the use to which an owner of land abutting upon navigable water can lawfully make of the land below high-water mark was not changed by the grant of such abutting land by the United States.

The right of such owner in that respect, as in all others touching his use of the land granted, is determined by the laws of the State where the land is situated, subject, of course, as everything else is, to the rights and powers granted to the United States by the Constitution—rights and powers, how-

ever, over *navigable waters*, and not over *land it had conveyed to an individual*, or which an individual owns, for the Constitution grants no such rights to Congress or to the United States.

Such is the decision in Shively v. Bowlby.

That such is the meaning of the rule that grants by the Government are to be strictly construed against the grantee is apparent when considered in connection with the case of United States v. Bostwick, 94 U. S. 53, 66, where it is said, "The United States when they contract with their citizens are controlled by the same laws that govern the citizens in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them."

"The United States are as much bound by their contracts as "are individuals."

Sinking-Fund Cases, 99 U. S. 700, 719.

If Congress has the power to prevent the cutting of timber (or the erection of fences) upon land, the title to which has passed to the Government grantee, by either patent or act of Congress, why should it be held as in Shiver v. Unites States, 159 U. S. 491, that *prior* to final disposition by the land department Congress has power to prohibit the cutting of timber on the land entered under the homestead laws? Why should it be held as in Noble v. Union River, etc., R. R., 147 U. S. 165, that after title had vested in the Government grantee the United States Secretary of the Interior could not take it away?

If the grantee of the United States did not become the *owner of property*, the discussion in the books regarding the right of the United States to grant the same lands the second time, or the proper construction of the various acts of Congress respecting grants of land, as in Wisconsin Central R. R. Co. v. Forsythe, 159 U. S. 46, and numerous other cases, would be meaningless.

No one would buy or improve land unless his *property rights* were recognized and protected.

When title to land in a state passes from the United States to an individual, the land becomes private property subject to control of the laws of the State where situated, and authority over it by the United States under that clause of the Constitution which vests in Congress the power to "dispose of

and make all needful rules and regulations respecting the territory or other property belonging to the United States" ceases.

See Wisconsin R. R. Co. v. Price County, 133 U. S., 469, 505-507.

Citing Carroll v. Safford, 3 How. 441, et seq.

Witherspoon v. Duncan, 4 Wall., 210, 218.

Also Forbes v. Gracey, 94 U. S., 762.

Northern Pac. R. R. Co. v. Patterson, 154 U. S., 130.

In such case the State may tax the land.

By the common law of this country it is lawful for stock to run at large and the owner of land is required to fence his land if he wishes to keep stock of others therefrom.

Buford v. Houtz, 133 U. S., 320.

This is the law of Colorado, and to fence his land is not only one of the lawful uses to which every owner of land in that State may put it, but to fence it is the only way that he can enjoy the beneficial use of it free from use by others as a pasture for all domestic animals.

But it is perhaps immaterial to this case whether it is lawful under the laws of Colorado for owners of land to fence the same or not, for whatever right the United States has over this matter must be its own right and not the right of Colorado; nor is this a proceeding to enforce any Colorado law. It is, however, material as showing that is a lawful use to make of land in Colorado, and further that unless it is fenced the owner cannot use it or beneficially enjoy it, and to deprive of the right to maintain the fence is to deprive him of his property.

What "rights granted to the United States by the Constitution" authorize Congress to prohibit an owner of land in a state from fencing it?

It will not be contended that the United States has general power or authority to enact police or municipal regulations, operative solely within the territorial limits of the State, upon subjects wholly confined to such limits.

Trade Mark Cases, 100 U. S., 82.

1 Hare, American Constitution Law, p. 535.

Cooley Const. Lim., p. 11, note 2 and p. 706.

United States v. Dewitt, 9. Wall., 41, 43–45.

The regulations of the ownership or use of private property in the States is not within the power of Congress unless the property, or subject of the regulation, is by the Constitution subjected to the action of Congress in relation to some power therein granted, or unless the regulation of such property is reasonably apt and necessary to the accomplishment of some purpose, power or function delegated to the United States by the Constitution.

Civil Rights Cases, 109 U. S., 3.
United States v. DeWitt, 9 Wall., 41, 43—45.

The United States v. DeWitt has been frequently cited with approval by this Court, several of which cases are here referred to as they contain full discussions of this subject and the authorities thereon.

Plumley v. Massachusetts, 155 U. S., 461.
Covington, etc., Bridge v. Kentucky, 154 U. S., 204.
In re Raher, 140 U. S., 545.

There are, of course, many clauses in the Constitution under which Congress *might* make valid enactments touching land in a State where the land was so situated as to bring it within some power of Congress; Congress might authorize its condemnation for public purposes under the power of eminent domain, or tax it by complying with constitutional requirements; if the land was affected by interstate commerce it might make regulations touching it; and many other such matters could be mentioned, but it is sufficient for this case that the land is not so situated and Congress has not so acted.

If Congress has any power at all under the facts in this case to make any regulations respecting the use to which the owner of this land can lawfully make of it, which we deny, this power must be found in that clause of the Constitution which vests in Congress the power to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

As said by the Chief Justice in McCulloch v. Maryland, 4 Wheaton, 316:

"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended; but we think a sound construction of the Constitution must allow to the National Legislature that discretion

with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution are constitutional."

It was said in United States Bank v. Deveaux, 5 Cranch, 61, 87:

"The Constitution, therefore, and the law, are to be ex-"pounded, without leaning one way or the other, according to "those general principles which usually govern in the con-"struction of fundamental or other laws."

And in Gibbons v. Ogdon, 9 Wheat., 1, 188, it is said:

"* * * The enlightened patriots who framed our Consti-"tution, and the people who adopted it, must be understood to "have employed words in their natural sense, and to have in-"tended what they said."

The principles referred to are set out very clearly in the opinion delivered by Chief Justice Marshall in Ogden v. Sanders, 12 Wheat., 213, 332, in the following language:

"* * * That the intention of the instrument must pre-"vail; that this intention must be collected from its words; "that its words are to be understood in that sense in which "they are generally used by those for whom the instrument "was intended; that its provisions are neither to be restricted "into insignificance, nor extended to objects not comprehended "in them, nor contemplated by its framers."

Bearing these principles in mind, what is the true meaning of the Constitution as applied to the facts of the case at bar?

While it is true that an act of Congress will not be declared unconstitutional unless there is a clear incompatibility between it and the Constitution, still the powers of Congress are delegated powers, and the incidental or implied powers, as well as express powers, have their limits beyond which it is unlawful to go.

The Constitution is the supreme law, alike for the government and for the citizen.

The power vested in Congress under this clause of the Constitution is "respecting the territory or other property belonging to the United States," and not respecting private property.

The power "to dispose" of property belonging to private individuals was not delegated to Congress; nor was the power to make "rules and regulations" respecting land of an individual situated as this is delegated to Congress.

In Civil Rights Cases, 109 U. S., 3, 21, it is said in effect, that while Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery, with all its badges and incidents, still, this does not give Congress the power to enact a statute making it unlawful for the owner of an inn, public conveyance, or theater, to deny its accommodations and privileges to some, even though the denial be founded upon race or color; and the reason assigned is that neither slavery nor servitude, nor a badge or incident of either, arises from such denial.

So, in the case at bar, while Congress has power to enact all needful and proper laws respecting the property of the United States, still, this does not give Congress the power to enact a statute making it unlawful for the individual to erect or maintain a fence upon his own private land; and the reason is that the fence does not touch the property of the United States, nor any rules or regulations concerning such property.

The "natural" meaning of rules and regulations respecting one piece of property confines them to the property mentioned and excludes them from other property.

Public or municipal control of streets and highways has never been held to give power over the property of adjoining owners, except to condemn and pay for it under the power of eminent domain as any other property needed for a public purpose.

It seems clear to us that the Constitution nowhere gives Congress *express* power to enact rules and regulations or laws respecting the right and privilege of the individual citizen to erect or maintain a fence solely upon his own land situated as the land in this case is.

And the implied or incidental powers of Congress do not enable it to make such regulations.

The *ownership* by the United States of land within one of the States gives Congress no more right to interfere with the land of others in that State than does the ownership of land by one individual give him the right to interfere with the land of another situated in the same State.

No *governmental* function respecting the property of individuals is added to the powers of Congress through the *ownership* by the United States of land situated in the State.

The right and power of Congress, express or implied, growing out of this clause of the Constitution, must, from the nature of things, stop where the right of private property of the citizen begins.

See Boyd v. United States, 116 U. S. 616, 625-630.

If this were not true, private property would be but a meaningless name, or, accurately speaking, a positive misnomer; for private property would be subject to the absolute fiat and will of Congress, whether situated adjacent to or in the same State as property owned by the United States, or in fact anywhere within the territorial limits of the United States; for who could set a bound to this power, who measure the distance in which it might lawfully operate? No one. And Congress would be an absolute and unlimited monarch. If it is true with respect to private property, it would follow as the night does the day that Congress would have the same power over the lives and liberties of the citizen, and no authority anywhere to call a halt.

Any argument that would justify Congress in the enactment of such legislation as complained of in the case at bar, proves too much, and would with one blow sweep away the Constitution.

We do not wish to be understood as intimating the fear that if this particular enactment of Congress should be upheld that Congress would proceed to the extent indicated. We know that it would not, and we know that the people, the source of governmental power, would not permit it; but we do mean that the people made the Constitution to render impossible the beginning of such results.

This court said in a case declaring unconstitutional an act of Congress because it conflicted with the fourth and fifth amendments to the Constitution:

"Illegitimate and unconstitutional practices get their first "footing by silent approaches and slight deviations from legal "modes of procedure. This can only be obviated by adhering "to the rule that constitutional provisions for the security of "person and property should be liberally construed. A close "literal construction deprives them of half their efficacy. It

"is the duty of the courts to be watchful for the constitutional "rights of citizens and against any stealthy encroachments "thereon. Their motto should be *obsta principiis.*"

Boyd v. United States, 116 U. S. 616, 635.

It seems equally clear that no *implied* power exists in Congress for the enactment of the statute complained of.

Standing alone, this should be sufficient to render void the act of Congress prohibiting the fencing of one's own land.

There are, however, positive prohibitions in the Coustitution against the enactment of such a law.

The fifth amendment to the Constitution provides among other things: "Nor shall private property be taken for public use without just compensation."

The ninth amendment provides that "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

The tenth amendment provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

It has been frequently held that the first ten amendments are limitations upon the power of the National Government.

Spies v. Illinois, 123 U. S., 131, 166 and citations.

Congress is as much restricted by the limitations upon its powers contained in the Constitution as it is invested with the powers therein granted.

Many of the cases in this Court wherein is discussed the subject of the power of Congress over local matters within the State involves the question of the distribution of such to the Nation and to the States respectively. While the controversy is carried on by individuals, still the situation often is such that the power to make some regulation such as complained of is conceded to exist, and the question is whether the power resides in the National or State government; the contention resolves itself into a question of the *distribution* of power by the people between the National and the State governments.

But the case at bar cuts deeper than a question of the distribution of power. It is a question of the rights of the individual guaranteed him by the Constitution itself. The object of the Constitution, and of the Government it created,

is the protection of the individual in the enjoyment of life, liberty and the pursuit of happiness, and it would indeed be a strange conclusion that would justify the government in destroying the object for the protection of which it is created; the only reason of its existence; the sole purpose of investing it with power. The majesty of the government in the zenith of its power would be exhibited by an act of suicide! The moment of its triumph would be the moment of its decay!

After all is said, what is the meaning of constitutional government if it is not the protection of the individual.

The powers granted to Congress stand side by side with the express limitations upon those powers, and they must be read together; when so read the Constitution means that Congress has the power to make needful rules and regulations respecting the property of the United States, such as Congress deems wise, up to the point where such rules and regulations deny or disparage the right of private property, a right retained by the people. Again the words of this Court (in Boyd v. United States), come unbidden to the mind as a living bulwark against confiscation of private property: "Illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."

Both the letter and spirit of the Ninth and Tenth Amendments to the Constitution forbid Congress from enacting a statute declaring unlawful the fencing of private property within the limits of a State.

This enactment is also in violation of the Fifth Amendment.

The right of the beneficial use of property is property.

> Monongahela Navigation Co. v. United States, 148 U. S., 312, 343–345.
>
> United States v. Gettysburg Electric Railway Co., 160 U. S., 668, 685.
>
> Pumpelly v. Green Bay Co., 13 Wall. 166.

See also Chappell v. United States, 160 U. S., 499, wherein the United States, uunder the power of eminent domain, condemned an easement in a strip of fast land for the purpose of transmitting rays of light without obstruction between two beacon lights.

The improvement upon land is land.

Lewis on Eminent Domain, sec. 285.
See also Monongahela Navigation Co. v. United States, 148 U. S., 312.

Physical invasion of property must be compensated for whether the land is "taken" or not.

Pumpelly v. Green Bay Co., 13 Wall., 166.

Congress is positively forbidden to authorize the taking of private property without just compensation. The Fifth Amendment of the Constitution was enacted by the people for this very purpose.

Monongahela Navigation Co. v. United States, 148 U. S., 312, 325, 345.
Great Falls Mfg. Co. v. Attorney General, 124 U. S., 581, 595–597.

An examination of the provisions of the act of Congress of February 25th, 1885, complained of in the case at bar, shows that such is its effect. Section 1 declares: that all enclosures in which is included any public lands are unlawful. The statute does not declare that it shall be unlawful to erect any fence *on* the government land, but that if the government land is enclosed within any fence whatever such enclosure is unlawful. That Congress intended this act to apply to fences wholly upon the land of private individuals if government land was within the same enclosure is apparent for several reasons: First. Without this statute no one had a right to erect a fence upon government land. The national government is amply protected in this respect under both the laws of the United States and of every State in the Union where such land is situated, and such laws afford ample means of procedure against the erection or maintenance of fences *on* government land. See Northern Pacific Ry. Co. v. Lewis, 162 U. S., 366.

Second. Contemporaneous history of the situation of the United States lands, and of the complaints which induced Congress to enact this statute shows that Congress intended it to apply to fences wholly erected upon the land of private individuals. The method of survey of public lands in sections; the granting by Congress of alternate sections; the fencing upon the sections granted by stockmen in the West;

and the complaint of others that thereby they were debarred from the public pasturage of government lands which was permitted by the United States, induced Congress to pass this statute.

It cannot be said that the fact that the United States does not take *and use for a public purpose* the land of the individual, his fence, or his right to use the land, that therefore it is not a "taking" within the meaning of the Fifth Amendment. The use is taken when the individual is prohibited from enjoying the use; the use is in such case literally taken from him. It can make no difference to *him* whether the United States uses for a public purpose the property it takes from him or not. It does, however, make this difference, that the United States has no authority to take it at all unless for use in public purposes.

"The question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken."

> Monongahela, etc., Co. v. United States, 148 U. S., 312, 343.

The fence is a portion of his property and is authorized by the statute to be removed, which means to take; and the fence is taken whether the materials which compose the fence are left or not; a fence is an improvement on the land, and a part of the land itself. The fence is taken, and the decree of the court was: That defendants absolutely remove and abate the fence and every part thereof, and that if it is not so abated that the marshal of the United States shall abate and remove the same. To do this the marshal must *physically invade* defendants' land.

Now, it is true the statute was not intended as an exercise of the power of eminent domain. No provision is made for "just compensation," or any compensation at all, and the decree is in accordance with the statute in this respect. Not only is no compensation provided by the statute, nor by the decree, but the removal of the fence is directed to be made by the marshal at the expense of the owner.

It will hardly be contended that in as much as the statute does not attempt the condemnation of this property under the power of eminent domain upon providing just compensa-

tion, that therefore it is exempt from the prohibition of the Fifth Amendment forbidding the taking of private property without just compensation. It is for the very reason that the statute does not provide just compensation that it is unconstitutional.

As has often been declared by this court, whenever in the execution of the powers granted the United States by the Constitution, lands in any State are needed by the United States for any public purpose, Congress may authorize such lands to be taken, paying just compensation, either by proceedings in the courts of the State with its consent, or by proceedings in the courts of the United States, with or without the consent of the State:

> Chappel v. United States, 160 U. S., 499, 510, and citations.

If it is desirable to establish highways through appellants' land, Congress can authorize the condemnation thereof upon making just compensation.

We contend that any statute the effect of which is to take, or authorize the taking of, private property without compensation is void, whatever may be the purpose of the statute. It cannot in the case at bar rest upon the taxing power, nor police power, nor power of eminent domain; it is not due process of law; it is void and not the law of the land.

While there was no duty resting upon appellants to give private right of way over their land and through their fences, still they have in effect accomplished this purpose by the erection of gates free to all at each section corner.

It has been said that appellants are entitled to fence each section, owned by them, separate from the others, but cannot fence one side of a few sections.

In the first place, it is for the owners and no one else to determine whether they will erect any fence at all upon their own land, or how much they will erect and where they will erect it.

In the second place, if it is to be conceded that they can lawfully erect fences on four sides of a section owned by them, then it must be conceded that they can lawfully erect a fence on one side.

In the third place, if they fenced four sides of each section, or four sides of each acre, the same effect exactly will result as results in the case at bar.

In the fourth place, if they could lawfully erect fences on four sides of each section it would also be lawful for them to take down all or a part of their fences; taking down all but such as is shown to exist in the case at bar, we would have the case at bar after going a useless, expensive, and circuitous route.

The proposition is unsound on the face of it.

CONSTRUCTION OF THE ACT OF FEB. 25, 1885.

We are not unmindful of the doctrine that where a statute is susceptible of two constructions, that will be adopted which will make the statute conform to the Constitution, but we do not believe that the act of February 25th, 1885, can be so construed. If, however, it can, and if we are right in our contention in the former portion of this brief, it must be construed so as to render it inapplicable to fences upon the land of private individuals situated within the limits of a State, and when so construed the decree in the case at bar is erroneous.

But we do not believe Congress intended this limited construction or meaning, and to uphold the statute so modified "would be to make a new law, not to enforce an old one," and this is not a judicial function.

United States v. Reese, 91 U. S., 214, 221.

It seems unnecessary to say any more than has heretofore been said, but we will mention the cases which we have been able to find upon this statute. There seems to be no decision of this Court in which the direct question, either of the constitutionality of this statute, or of its construction touching facts similar to those in this case, was determined.

In Cameron v. United States, 148 U. S., 301, 305, it was said, referring to the statute in question:

"The law was, however, never intended to operate upon per-
"sons who had taken possession under a *bona fide* claim, or
"color of title."

While it is true that the land spoken of in the Cameron case was the land included in the inclosure, it is equally true that it was also the land upon which the fence was built. The only land involved was that of which Cameron had taken possession

under a *bona fide* claim or color of title, and was from the express terms of the statute itself exempt from the operation of the statute. Proceedings under this statute are not a proper method to try title to land. The case of a fence wholly upon the land of a citizen in a State which results in inclosure of public domain, by reason of the fact of governmental ownership of alternate sections adjacent to that upon which the fence was built and maintained was not before the court in the Cameron case.

This statute has been before various United States Circuit and Territorial Courts.

The cases of United States v. Osborne, 44 Fed. Rep. 29, and United States v. Brandestein, 32 Fed.Rep. 738, are to the same effect as the Cameron case.

In United States v. Brighton Ranch Co., 25 Fed. Rep. 465:

"The fence stood partly on deeded lands, school lands, and "lands entered under the homestead, pre-emption and timber-"culture laws of the United States. Inside the fence were "a large number of acres of vacant public land."

The court said:

"(1) There exists no right in the defendants to build any "fence on the lands of the United States. (2) All lands are for "this purpose lands of the United States so long as the *legal* "*title* remains in the United States. (3) It is the right "of the United States and its duty to protect all such lands "from misuse in cases where there have been any kind of "entries, whether of pre-emption, homestead, or private en-"try, though the purchase money be paid, so long as the legal "title remains in the United States; except where these latter "parties build their own fences, or give express license to "others to do it. In these cases it holds the title in trust, "and can maintain this bill to remove the fence or prevents its "erection."

In the same case, reported in 26 Federal Reporter, 218, it appeared that the fence was partly built upon public land belonging to the United States, and partly on land belonging to the defendant, and it was held that a court of equity would give relief against a fence built upon Government land.

The case of United States v. Cleaveland and Colorado Cattle Co., 33 Fed. Rep. 333, has no bearing upon this matter. The question involved in that case, and the only question, was whether the defendant therein had color of title to the land which it fenced in, claiming it under a Mexican land grant, and

the court decided that the defendant had no color of title; and further held that the question could be determined in an injunction suit brought to restrain him from fencing without first going into a court of law in an action of ejectment to try title. The act of February 25, 1885, was mentioned in the opinion, but the court expressly refrained from deciding anything with reference to it.

United States v. Felderward, 36 Fed. Rep., 490, was decided upon a demurrer to the indictment, and it was held that the indictment must negative all the exceptions contained in the statute; that the indictment was defective because it did not allege that the enclosure on the public land was not made "under an asserted right thereto, by or under claim made in good faith with a view to entry thereof at the proper land office under the general laws of the United States." The gist of the decision is that an indictment charging an unlawful enclosure *on* the public land must go further and negative the exceptions contained in the statute, for some enclosures *on* the public land are not contrary to the statute.

United States v. Cook, 36 Fed. Rep., 896, is the exact opposite of the Felderward case, and holds that an indictment need not negative alleged exceptions in the statute, for these matters are not exceptions but matters of defense.

The following cases were decided by Territorial Supreme Courts:

In United States v. Douglas-Wilson-Sartoris Co., 3 Wyo., 288, defendants owned odd numbered sections in a large tract of land, and the Government owned the even numbered sections adjacent to the odd numbered ones. Defendant built a fence entirely upon its own land, which resulted in enclosing about two hundred sections of Government land. Gates were put at the section corners. The court held that the act of Congress of February 25, 1885, did not make such fences unlawful, and that there was nothing without the statute to render such fences unlawful. Two of the three judges held that the act applied to the fence, one of whom held the act unconstitutional, and the other held it valid and dissented from the opinion of the court. The third judge agreed in the decision, holding that the fence was not unlawful, but in his view the act did not apply to the fence, because the statute must be so construed as not to render it uncon-

stitutional, and if applied to the fence it would be unconstitutional.

United States v. Buford, 8 Utah, 173, held the statute valid and applicable to the fence even though built wholly upon the land of a private individual. The basis of this decision is an alleged reservation by the United States of a right of way over the lands granted.

United States v. Elliot, 7 Utah, 389, held that school lands, the 16 and 36 sections in each township, were not public lands in the meaning of the act of February 25, 1885, and that such act did not therefore apply to fencing on such lands.

Barkley v. United States, 3 Washington, 522, held that school lands were public lands within the meaning of the act of February 25, 1885, and that it was unlawful for an individual to enter upon such lands and enclose them.

United States v. Bisel, 8 Mont., 20, and United States v. Flaherty, 8 Mont., 31, are to the same effect as the Barkley case.

In United States v. Godwin, 7 Mont., 402, the land enclosed and upon which the fence was built was not public land, and defendant asserted a *bona fide* claim or right thereto with a a view to entry under the land laws of Congress, and the fence was held therefore not to be prohibited by the statute.

These decisions are cited, not as authority, but merely to show the various views that have been taken of this statute by the courts in the localities where it is most frequently considered.

The power of Congress to make local regulations in the Territories is entirely different from its powers with reference to local regulations in the limits of States.

A question similar in some respects to the one at bar arose in Texas under the Statutes of that state, making an enclosure of public lands unlawful, and it was held that the State could compel the removal and destruction of a fence although built upon land owned by a private individual, and that such a fence if it resulted in enclosing public lands, was both a purpresture and a nuisance.

State ex rel. v. Goodnight, 70 Texas, 682.

The constitutionality of the statute as applicable to a fence wholly upon defendant's lands was not broached and the court did not consider it, but if it had, the question would have

been entirely unlike that raised in the case at bar as to the constitutionality of the act of Congress, because there is no analogy between the constitutional power of a State respecting land of an individual within its territorial limits, and the constitutional power of Congress respecting such land.

In regard to the intimation that Congress reserved a right of way over land granted private individuals in the State, we only wish to say we know of no statute or law that would justify any such claim. In fact no such claim is made by the Government in this case, and the decisions referred to by us in the former part of this brief do not recognize any such reservation. It certainly reserved no public right of way—no highway; and while we deny that it reserved any right in this respect whatever, still, if any such claim should be made, it would be but a private right of way, though who could use such right is difficult to see. At any rate the defendants in the case at bar have put swinging gates at every section corner of their fence, and declare in their answer that anyone may use them who chooses for the purpose of passage over the land.

In regard to the intimation in the Texas court that a fence built entirely upon the land of a private individual, which incidentally results in the enclosure of the public lands is a purpresture we suggest: First. That if such be the case the act of Congress of February 25, 1885, was not needed. Second. Whether or not such fence does constitute a purpresture is to be determined by the laws of the State within whose borders the fence exists. Third. We deny that such a fence is a purpresture, because purpresture at common law is constituted by an actual invasion of the public land and is never accomplished by erections entirely upon the land of the individual bordering upon the public lands. Fourth. Purpresture has application only to public highways, either of land or water, or to public commons and the like, not to land which is public merely because owned by the public or government and held for sale on government account.

We respectfully submit that the decree should be reversed and the bill dismissed.

JAS. W. McCREERY,
CHAS. W. BATES,
for Appellants.

167-518

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SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 278.

DANIEL A. CAMFIELD and WILLIAM DRURY,

Appellants,

vs.

THE UNITED STATES.

Brief in the Interest of Appellants Filed by leave of the Court.

C. W. BUNN.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 278.

DANIEL A. CAMFIELD and WILLIAM DRURY,

Appellants,

vs.

THE UNITED STATES.

This case involves a question of great importance to the Northern Pacific Railway Company and to every other grantee of public lands. For this reason we have by courtesy of counsel and by permission of the court been granted leave to file a brief in the interest of the appellants.

From the beginning the acts of congress making grants of lands to railway companies have uniformly applied to alternate sections. Instead of granting contiguous sections so as to make the grant a solid body of lands, congress has seen fit to adopt the policy of granting odd or even sections as the case may be, retaining the alternate sections to the United States. In conformity with this policy congress granted on July 2, 1864, *to*

the Northern Pacific Railroad Company odd sections of land from Lake Superior to the Pacific Ocean, amounting to ten sections per mile in states and twenty sections per mile in territories. The interest of this company in the question is sufficiently manifest, when it is considered, that if the decision of the court below is to be sustained, large portions of this grant would be thereby rendered unsalable.

This is a suit in equity brought by the United States upon the act of congress of February 25, 1885, which provides:

> "That all inclosures of any public lands in any state or territory of the United States, heretofore or to be hereafter made, erected or constructed by any person, party, association or corporation, to any of which land included within the inclosure, the person, party, association or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any state or any of the territories of the United States, without claim, color of title or asserted right as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited."

The appellants were enjoined in the court below from maintaining a certain fence; they were the owners of certain odd sections of land and the fence complained of was completely upon their own lands; alternating with their odd sections the government owned the even sections; the appellants built the fence in the manner shown

in the diagram on the opposite page; no part of the fence was upon the government land; the appellants were not trespassers on that land; they committed no wrong against the United States except against such right of the United States as may have been created by said statute. There is no common law or general principle of law which forbids their placing a fence upon their own land. The United States has no cause of complaint unless the statute creates it, for the injury to the United States (if any) is incidental only and consequential upon the rightful construction of a fence by a fee simple owner upon his own land.

We submit two propositions:

First. *The statute should not be construed to prohibit one from fencing his own land, nor to prohibit the fence in question.*

Second. *If it must be so construed it is in excess of the constitutional power of congress.*

I.

As the court below well said, it matters not what the intent of the appellants was in making the inclosure. Intent is not an element of the cause of action created by the statute. The prohibition of the statute is against the inclosure of public lands. If the fence is an inclosure of public lands within the meaning of the statute it is actionable; if it is not an inclosure within the meaning of the statute it is not actionable; and it matters not that the appellants may have intended to prevent other persons from obtaining access to the even sections.

Cujus est solum ejus est usque ad cælum is one of the fundamental maxims of the common law. He who owns the soil has a right to use it, or to remove it, to the center of the earth, or to build structures upon it to the sky. Congress granted the public domain under special acts and under general laws, prior to the year 1895 when this statute was passed, with all the common law incidents of ownership attached to the soil; among the most important of which was a right in

each owner to inclose his land by a fence. Congress cannot now under the guise of legislation repeal these grants, or take away the necessary incidents of the ownership it has conferred upon corporations and individuals; it cannot take away the right of every grantee of the United States to fence his land, and to fence it regardless of the consequences to adjoining land so long as his fence stands upon his own.

The fact that a fence built in the manner indicated on the diagram will operate incidently and indirectly to inclose public lands is a necessary result, which congress must have foreseen when it made the grants, of the policy of granting odd sections and retaining even ones as public lands. Suppose each one of the odd sections indicated on the plat belonged to a separate individual and each of these individuals fenced his own land for agricultural purposes,as in law he might undoubtedly do; every one of the even sections of the United States would be more completely inclosed than it is in the case at bar by the fence in question. And yet is it to be doubted that the land owners in the case put could lawfully fence their own lands? Does the incidental result to neighboring lands make the fences unlawful? The result follows from the policy of congress not from the act of building the fences. The true solution of the situation must be found in the power of eminent domain, which can open highways and furnish access to the even sections. The law of North Dakota for example provides that every

section line is or may be made a public highway.

The statute was, we submit, plainly intended to prevent trespass upon and occupation of public lands ,such occupation as would lay the basis for a claim, or color of a claim of title; such possession as would injure the lands or the sale thereof by the United States and introduce litigation and uncertainty into titles. This construction is a reasonable oneand fully borne out by the language of the act. The title of the law is "An Act to Prevent Unlawful Occupancy of the Public Lands." The act in speaking of inclosures of the public lands means an inclosure which is directly a fencing in of such public lands, and not an inclosure which is the mere consequential or indirect result of the lawful fencing of private lands. The prohibition against fencing is coupled in the statute with a prohibition of the "exclusive use and occupancy of any part of the public lands * * * without claim, color of title, or asserted right as above specified."

II.

If the statute is not to be construed as we claim, and if it means what the learned Circuit Court of Appeals held it to mean, it is in excess, we submit, of the powers of congress and unconstitutional. This question does not appear to have been pressed upon the court below. It is disposed of in one brief sentence in the opinion of Thayer, Judge, "it was within the power of congress to enact such a law."

The land in question is within the limits of the state of Colorado. Colorado was admitted by a proclamation of President Grant dated August 1, 1876, (19 Stats .at Large, 665.) By the express terms of the admission Colorado came in on a equal footing with the original states. It was provided in the admission that the people of the state disclaim forever all right and title to the unappropriated public lands lying within the territory and that the same should be and remain at the sole and entire disposition of the United States and be free from state taxation.

As Marshall, C. J., said in McCulloch v. Maryland, 4 wheat. 316, 415:

> "Some state constitutions were formed before some since that of the United States. We cannot believe that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same as if they had been formed at the same time."

In the case of Pollard, et al. Lessee, v. John Hagan, et al., 3 How. 212, the question arose of the title and jurisdiction of the state of Alabama over the soil under navigable waters within the limits of the state, the United States having acquired the land in controversy from the King of Spain by treaty. The doctrine was settled in that case that the state on admission into the Union succeeded to all the rights of sovereignty, jurisdiction and eminent domain, as to the land in question, which each of the thirteen states possessed with respect to similar land within their borders; that the United States hold the rights of

municipal sovereignty within the territories in trust for the state to be created, and when this state is created the trust is executed and the sovereignty passes from the general government to that of the state. The court said in that case that if an express stipulation had been inserted in the treaty granting the right of municipal jurisdiction, sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative, because the United States has no constitutional capacity to exercise municipal jurisdiction, sovereignty or eminent domain within the limits of a state or elsewhere, except in cases where it is expressly granted.

The jurisdiction of congress over the territory of the United States is based on Article IV, Sec. 3 of the constitution. "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States"; or the power may perhaps be referred to the general and necessary power of every sovereign to acquire territory. *American Insurance Company v. Canter*, 1 Pet. 511-542. From whichever source the power is derived it is undoubtedly plenary and covers all the fields of legislation. *Mormon Church v. United States*, 136 U. S. 1, 42-44.

But upon the admission of a state into the Union, public lands of the United States being included within the limits of the state, the proprietary right to such lands held by the federal government is in many respects similar to that of

an individual. The principal distinction between the two proprietorships is that the government makes conveyance under its own laws and sues in its own courts, whilst an individual proprietor conveys under the laws of the state and prosecutes under those laws for an injury done. But the general power of sovereignty and municipal legislation of congress in a territory ceases on the admission of the state. Only the proprietary right of the United States is left, with the right to dispose of its lands under the laws of congress and protect them from spoliation, trespass, etc., under such regulations as Congress may deem proper. *Pollard, et al., Lessee v. John Hagan, et al., supra: United States v. Railroad Company*, 6 McLean, 517; *Woodruff v. North Bloomfield Gravel Mining Co.*, 18 Fed. Rep. 753-772. 2 *Story on the Constitution*, Sec. 1328.

As the court said in last case cited, the United States as public land owner could sell its lands in large or small quantities, or lease them, or reserve them from sale, or grant a limited estate subject to an easement, or in case of mines might allow them to be worked free of charge, or on payment of a royalty. But while the United States could do all this with its own lands held in the character of proprietor, it could not grant such lands and by statute or otherwise impose an easement for the benefit of its grantees upon lands already owned in fee by private parties, or

authorize any trespass upon or injury to such other lands. The United States can deal with its own as any other land proprietor can deal with his own.

If the statute in question therefore is a statute designed to prevent unlawful entry upon or trespass upon the public lands, it is within the clear authority of congress to pass, but if it is an attempt to exercise legislative and police control over the lands of private individuals for the benefit of the lands of the United States, it is wholly beyond the power of congress. Congress clearly could not pass a statute defining what should be considered as nuisances within the limits of a state; could not for example provide that a lime kiln opened on lands in a state adjoining public lands should be a nuisance and be abated by process from the United States courts. Congress cannot declare in other words that a business carried on on such adjoining lands, or a structure erected on such adjoining lands, lawful under the state law, shall be unlawful. The power of general sovereignty, legislation and police, is in the state government, and no act of a private land owner on his own land, lawful according to the state law, can be made unlawful by congress under the guise of its power to dispose of and make needful rules and regulations respecting the property belonging to the United States. The right to make rules and regulations respecting the territory belonging to the United States may well include all laws prohibiting acts performed upon such terri-

tory, but it does not follow that it can be made to include a law controlling the use of his own property by a private proprietor, nor can it be made to afford a ground for the federal government to enact municipal legislation and regulation within the limits of a state. There are some limits upon the power of congress to make rules and regulations respecting the territory of the United States. It is not every measure which might promote the settlement of the public lands, or the disposal thereof, which is within the power of congress to enact. Unquestionably a law prohibiting the purchase and sale of private property would enhance the value of adjoining public lands and increase their sale, yet no one would contend that such a law was within the power of congress.

The true rule of limitation is that pointed out by the authorities cited ,to-wit: that the rules and regulations enacted by congress cannot be permitted to prohibit any use of their own lands by proprietors, which would in the absence of such legislation be lawful. The United States cannot under guise of this power impose burdens or servitudes of any nature upon lands held by private individuals. It cannot prohibit a private individual from fencing his land; it cannot compel him to leave his own land open so as to afford access for grazing or other purposes to the lands of the United States, or so as to secure a right of the public to cross the same. These subjects come within the police power which is one of the powers of sovereignty vested exclusively in the state.

C. W. BUNN,
Counsel for Northern Pacific Railway Company.

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In the Supreme Court of the United States.

OCTOBER TERM, 1896.

DANIEL A. CAMFIELD AND WILLIAM Drury, appellants,
v.
THE UNITED STATES.
} No. 278.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

DANIEL A. CAMFIELD AND WILLIAM Drury, appellants, *v.* THE UNITED STATES. } No. 278.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

This case is here on appeal from the United States circuit court of appeals for the eighth circuit, from a decree of December term, 1894, affirming the decree of the circuit court of the United States for the district of Colorado, and from a further decree of March 18, 1895, denying a petition for a rehearing in the cause.

THE CASE

Is fully set out in the bill and answer, from which it appears that the defendants, having acquired the ownership of the odd-numbered sections of certain tracts of

land in the State of Colorado, lying within the limits of the grant made to the Union Pacific Railroad Company by the act of July 1, 1862, built their fence on such odd-numbered sections and then, having acquired from the owner or owners permission to do so, built a fence on the adjoining tracts of land opposite to the even-numbered sections lying between their odd sections, in such a manner as that the sections of fence so constructed on their odd sections and on the land opposite to the even sections, formed practically, although not actually, a continuous line of fence, which, being extended around the entire body of land within which their odd sections lay, embraced, necessarily, the even-numbered sections, which are the property of the United States.

From an early day in the history of our public domain it had been the policy of the Government to allow its public lands to be used by the people in common for grazing and other purposes. But this privilege, wise and beneficent in its purpose, became the subject of gross abuse. Millions of acres of the public land became inclosed by the owners of large herds of cattle, who sought thereby to appropriate these public lands to their exclusive use.

By *Act of February 25, 1885* (23 Stat., 321), it was provided:

> That all inclosures of any public lands in any State or Territory of the United States heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, or corporation making or controlling

> the inclosure had no claim or color of title, made or acquired in good faith, or an asserted right thereto, by or under claim made in good faith, with a view to entry thereof at the proper land office under the general laws of the United States, at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited.

It is not denied, but is freely admitted by the defendants in their answer, as well as in the brief of their counsel, that the even-numbered sections of land are the property of the United States; that defendants assert no claim or color of title thereto, and that these even-numbered sections of land are inclosed within the fence erected and controlled by the defendants. But defendants insist now, as they have heretofore insisted in the circuit court and the circuit court of appeals, that they are not in violation of the statute; that they have done nothing of which the United States may rightfully complain; that they have not trespassed upon the lands of the United States; that their fences were built and stand only on their own lands and on lands to which they had acquired a right to erect them.

They insist that if by the erection of fencing on their own land, for the purpose of so inclosing it as that it may be made available for the uses to which defendants desire to put it, the lands of the United States become also inclosed, such a result must be ascribed only to the improvidence and carelessness of the United States in so surveying and laying off its public land as that the

portions sold and granted by the United States can not be inclosed by the purchasers and owners without embracing also within such inclosure the alternate sections reserved by the United States.

The act of February 25, 1885, heretofore recited, forbids (1) the inclosure of any public lands of the United States in any State or Territory by any person having no claim or color of title and asserting no right thereto under the general laws of the United States; (2) the assertion of a right "to the exclusive use and occupancy of any part of the public lands of the United States without claim, color of title, or asserted right;" (3) the obstruction or prevention, by force or threats, "or by any fencing or inclosing of public land subject to settlement or entry, of any person from peaceably entering upon or establishing a residence on any tract of land;" (4) the prevention or obstruction by any person of "free passage or transit over or through the public lands."

It is not denied in this case that the fence or fences erected, maintained, and controlled by the defendants do inclose the public lands of the United States; that they do obstruct and prevent a settlement of such public lands; that they obstruct "free passage or transit over or through the public lands;" and it can not be reasonably denied that such fence, so maintained, is of itself the assertion of a right to the exclusive use and occupancy of the land which it incloses.

The briefs on behalf of the defendants in error make formidable display of learning and logic in defense of the action of defendants in erecting and maintaining such

inclosure and in support of the alleged legal right on which it is sought to rest their conduct.

We will not find it necessary to consider the questions so elaborately discussed in the briefs of defendants' counsel, but will seek the solution of the problem by a more direct, shorter, and obvious way.

The bill filed on behalf of the United States charges (Rec., 4) that the fence erected and maintained by the defendants "is a complete inclosure and incloses a large tract of your orator's domain in the State of Colorado."

The defendants in their answer do not deny this charge, but they do (Rec., 11)—

> deny that they, or either of them, have wrongfully designed or attempted to encroach and intrude upon the lands of plaintiff, the United States, in any illegal manner, or monopolize the use of the same for their own and special use [sic].

It may be true, and doubtless is, that defendants have carefully avoided *intruding* or *encroaching* upon the lands of the United States, but they do not pretend to deny that they have inclosed these lands with a fence, erected, it may be, altogether upon their own land and contiguous land of other persons from whom they have acquired the right to erect such fence.

One of the positions taken for defendants in the brief of their counsel is, that when the United States divested themselves of title to the land of which defendants have since acquired title and possession, the United States stood as any other vendor of land, and retained no rights, or powers, with reference to the land sold, except such

as were expressly reserved in the grant; that they retained none by virtue of any inherent power in the Government.

The United States, to be sure, when they go into the market place as buyer or seller, subject themselves to the laws by which such transactions are regulated and controlled.

But the United States have a distinct personality which characterizes all their transactions and limits the operation of the laws to which they are subject.

A general rule for the construction of grants is that they shall be taken more strongly against the grantor than the grantee. But grants from the United States are construed against the grantee and more favorably to the grantor.

The United States have a well-defined and long-established system by which the public domain is regulated and in accordance with which it is disposed of to purchasers. This system is prescribed by the statute law of the United States, by regulations of the Land Department which have the force of law, and by a well-understood public policy.

All purchasers from or under the United States acquire portions of the public domain with full knowledge of, and subject to this system.

The policy of the United States in disposing of the public domain has been to extend its benefits to the greatest number possible and to discourage and prevent the accumulation of this land in the hands of monopolists.

To that end, in part, has it pursued the course of granting alternate sections, reserving the intermediate ones.

In the large land grants to railroad companies the Government has uniformly reserved the even-numbered sections, granting the odd-numbered ones.

It has, by statute, reserved the right to use the water and rights of way through the public lands for canals, and by section 2477, Revised Statutes, it has provided that—

> The right of way for the construction of highways over public land, not reserved for public uses, is hereby granted.

It is, then, subject to the system which the Government has adopted for the disposition of its public domain; and subject, too, to all the rights reserved by statutes, that a purchaser from or under the United States acquires title.

These defendants acquired the rights and titles under which they hold the odd-numbered sections of land, with full notice of the fact that the even-numbered sections, which alternately separated their odd-numbered sections, were reserved by the United States as a part of the public domain.

They knew that, however located might be the sections of land which they acquired by purchase, they could use and enjoy them in such manner only as would not tend to defeat, obstruct, or impair the operations of the Government in using or disposing of the even-numbered sections reserved as part of the public domain.

They knew that the public rights and interests were paramount to any private concerns, and they took these lands with full knowledge of the fact that the land reserved by the United States must and would be disposed

of in accordance with the established system, however inconvenient the result might be to themselves or to other prior purchasers.

In the brief of Mr. Bunn, counsel for Northern Pacific Railroad Company, it is said (p. 5):

> The fact that a fence built in the manner indicated on the diagram will operate incidentally and indirectly to inclose public lands is a necessary result, which Congress must have foreseen when it made the grants, of the policy of granting odd sections and retaining even ones as public lands.

It might, with far more propriety and, we think, with more obvious reason, be said that the fact that the United States had a fixed, long-established, and well-known system by which their public lands were disposed of, under and with full knowledge of which these defendants acquired the lands purchased by them, under which system purchasers were not permitted to acquire from the Government adjoining sections of land, but only alternate sections, compels the conclusion that these defendants "must have foreseen" when they bought the odd-numbered sections, that under the Government system they could not be permitted to embrace all their odd-numbered sections within one inclosure, because such a result would be not only an appropriation of the Government lands, but would be a direct violation of the Government system.

To every man belongs the right of using his own property as his interests, convenience, or comfort may incline him, subject always, however, to the sound and healthful limitation that he must so use it as not to injure his neighbor in the enjoyment of his property.

The public have certain rights and interests which may not be even exposed to danger by any peculiar or eccentric use to which a private citizen may see fit to apply his property. The ordinances of many municipalities prohibit the erection of buildings whose height exceeds a prescribed number of stories.

A statute of Massachusetts declared fences or like structures "unnecessarily exceeding 6 feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property," to be private nuisances. And in *Rideout* v. *Knox*, 148 Mass., 368, the constitutionality of this statute was sustained.

The device resorted to in this case plainly evinces the deliberate purpose to appropriate the public land.

The strongest and most unequivocal expression of an assertion of proprietorship is by inclosing the land as to which their claim is made.

True, the defendants here have not set their stakes on the Government land, nor have they, by continuous and unbroken chain of fence, sought to inclose it. They have built their fence on their own land, in part, on the odd-numbered sections as far as the front of these sections extended. When the limit of a section was reached, they did not continue the fence across the adjoining even-numbered section, but, with an interval of 6 or 8 inches, from the end of the fence on their odd-numbered section they built on the land opposite to the even-numbered section a line of fence extending the length of the front of such section. And so on, throughout, around the whole

body of this land, until they had embraced within this inclosure at least 20,000 acres of the lands of the United States.

They say that the incorporation of these 20,000 acres with their own land was a mere *incident* resulting from the peculiar, injudicious, and improvident method employed by the United States for laying off its public lands; that they should not be held responsible for a result which Congress "must have foreseen."

This quality of logic has been applied in some quarters in the defense of persons charged with the commission of crime. It has been urged that these unfortunates were created with a hereditary predisposition to murder, arson, and robbery; that their Creator "must have foreseen" that they would do these things, and therefore they should not be held to a moral or legal accountability for them.

But in this case the method was too systematic and inured too plainly to the self-interest of these defendants for them to avoid its consequences by pleading an inevitable and overruling plan on the part of the Government which compelled this result.

This act of February 25, 1885, has as yet been construed in but very few cases, and these are cited in the opinion of the circuit court (Rec., 12) and the circuit court of appeals (Rec., 23).

I beg to call attention to but one of them, *United States* v. *Douglas-Willan Sartoris Company* (3 Wyo., 288).

In that case three judges sat. Of these Saufley, J., and Corn, J., concurred in the result of holding that the

United States had no cause of action, but they reached this result by different and somewhat conflicting paths; the chief justice, Maginnis, dissenting, on the ground "that the act was intended to apply to the case of the defendant, and that it is a valid and constitutional enactment;" Saufley, J., concurring "with the chief justice on the first branch of the propositions," to-wit, that the act was intended to apply to the case of the defendant, but "differ from him on the second," to wit, that it was a valid and constitutional enactment. (3 Wyo., top of p. 293.)

While Corn, J., rested his conclusions upon the idea "that whatever may be the apparent meaning of the language of the statute, it will not be presumed that it was the legislative intent to forbid to an owner of land the right to erect a fence on his own property, unless such intent be clearly expressed in the statute." (3 Wyo., bottom p. 290.) How legislative "intent can be clearly expressed in the statute," except by "the apparent meaning of the language of the statute," I will not stop now to inquire, but ask attention to the clear, plain, common sense which commends the opinion of Chief Justice Maginnis, who concludes:

> In my opinion, therefore, the statute is not unconstitutional (even though some features of it may be), since it is perfectly apparent that it is within the province of Congress to make an assertion of a right to public property unlawful; and I further believe there can be no doubt but that defendant in this case has asserted a right such as is forbidden.

It is insisted in the briefs that the act of February 25, 1885, is unconstitutional, because it assumes the existence in Congress of a power to regulate and control the use and enjoyment of land, the title to which has been granted by the United States, and which has, therefore, become private property; and also because Congress is assuming "to enact police or municipal regulations" within the limits of the sovereign State of Colorado.

We are unable to discover in the act any purpose, or intent, on the part of Congress to attempt to regulate or control the use or enjoyment by the defendants of their own land.

Congress, while enacting nothing on that line, merely recognizes, declares, and seeks to apply the maxim "*sic utere tuo ut alienum non laedas.*"

> As was said in *Munn* v. *Illinois* (94 U. S., 124), while power does not exist with the whole people to control rights that are purely and exclusively private, Government may require each citizen to so conduct himself and so use his own property as not unnecessarily to injure another. (*Mugler* v. *Kansas*, 123 U. S., 660.)

And why should not Congress legislate to the utmost extent of its power, as to the regulation and control of land, even within the territorial jurisdiction of a sovereign State, if such land is the property of the United States?

The act does not prohibit the inclosure of any other than public land. It does not limit or restrict the use or enjoyment of any private property, except beyond the limits marked by the maxim quoted.

Counsel for appellants have raised in their brief two preliminary questions touching the jurisdiction of this court: First, of the case, and, secondly, of the question of constitutionality, now for the first time raised.

It is quite manifest that no question was raised on the pleadings, or, so far as we know, in the argument in the district court, as to "the construction or application of the Constitution of the United States;" nor was "the constitutionality of any law of the United States, or the validity or construction of any treaty, *drawn in question*." And hence, no appeal lay from the district court to the Supreme Court of the United States.

We prefer, so far as the Government is concerned, that the case, now that it is here, should be determined on its merits, and that the question of the true meaning and effect of the statute may be definitively settled.

HOLMES CONRAD,
Solicitor-General.